Petition

81-547

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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

DAVID DIAZ, ET UX, ET AL
Petitioners

v.

RONALD BEYER, ET UX
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WACO, TEXAS

L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642
(817) 729-3211
Bar Card No. 07816000
Attorney for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

1.

Can a state statute, consistent with the due process clause of the Fourteenth Amendment, authorize termination of parental rights without a showing of unfitness or detriment to the child?

2.

If the due process clause of the Fourteenth Amendment requires clear and convincing evidence as the standard of proof at trial in a suit for involuntary termination of parental rights, can it be circumvented on appeal by applying the standard of review normally used for preponderance of the evidence?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. David Diaz—Petitioner
2. Brenda Starr Diaz—Petitioner
3. Dixie Marie Hensley—Petitioner
4. Ronald Beyer—Respondent
5. Angela Beyer—Respondent
6. Terry Raye Starr [Diaz] [Beyer]—Child Subject of Suit

L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642
(817) 729-3211
Bar Card No. 07816000

Attorney of record for Petitioners David Diaz, Brenda Starr Diaz, Dixie Marie Hensley

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WACO, TEXAS

To the Honorable Chief Justice and Associate Justices Of the Supreme Court of the United States:

Petitioners, Brenda Starr Diaz, David Diaz and Dixie Marie Hensley, pray that a writ of certiorari issue to review the January 30, 1981 judgment of the Court of Civil Appeals for the Tenth Supreme Judicial District of the State of Texas, sitting in Waco, Texas.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, Waco, Texas,

is reported as David Diaz v. Ronald Beyer, 611 S.W.2d 726 (Tex. Civ. App.—Waco 1981, writ ref'd N.R.E.). A copy of said opinion and order is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, Waco, Texas, was entered January 30, 1981. Petitioner's Motion for Rehearing was denied February 19, 1981. Petitioner's Application for Writ of Error to the Supreme Court of Texas was "Refused: No reversible Error", on May 6, 1981. Petitioner's Application for Rehearing on Writ of Error was denied June 17, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Can a state statute, consistent with the due process clause of the Fourteenth Amendment, authorize termination of parental rights without a showing of unfitness or detriment to the child?

2. If the due process clause of the Fourteenth Amendment requires clear and convincing evidence as the standard of proof at trial in a suit for involuntary termination of parental rights, can it be circumvented on appeal by applying the standard of review normally used for preponderance of the evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal turns on the Fourteenth Amendment to the United States Constitution and provisions of Chapters 11, 12, and 15 of the Texas Family Code, all of the

pertinent parts of such laws being set out in the appendices of this petition, and also Title 42 Section 1983 U.S.C.

STATEMENT OF THE CASE

This is a suit for the involuntary termination of the parental rights of Terry Raye Starr's natural parents, Brenda and David Diaz, and for his private adoption by Ronald and Angela Beyer. Brenda Starr Diaz, David Diaz and Dixie Marie Hensley, the maternal grandmother, are the Petitioners herein, and the Beyers are the Respondents. This case arose when under dire circumstances the expectant mother, Brenda Starr, tentatively agreed to a private adoption of her child with the Beyers. While still in the hospital after giving birth to Terry Raye Starr, Brenda signed an instrument to allow the adoption. Within a week Brenda recanted, married the father of the child, David Diaz, and together they sought the return of their son. The unrelated prospective adoptive parents quickly got a court injunction against Brenda and David and filed this suit to terminate involuntarily the natural parents' rights and to adopt Terry Raye Starr. Brenda and David Diaz seek review of the trial court's decision to terminate their rights and grant the adoption.

Facts:[1]

Brenda Starr was a fourteen-year-old unmarried expectant mother, whose own mother and father had been

1. The Texas Court of Civil Appeals, having applied an erroneous standard for review of the clear and convincing evidence standard (See Question Presented No. 2), ignored competent evidence from the record below. Petitioners include for this Court's consideration evidence present in the record but given little or no consideration by the court below. Reference is made to the record by name of the court reporter and page wherein contained.

unable to assist her when she accepted help from Angela Beyer. When Brenda became pregnant, she was living in Mexia, Texas, with her mother, Dixie Marie Hensley and step-father. Difficult problems existed in the home. Brenda's mother testified that she was scared of her husband, that he took drugs, and that he demanded that Brenda get an abortion. [Birkes, SoF 129-32] It was decided that Brenda would go to Oklahoma to stay with her natural father. Shortly before leaving Texas, Brenda notified David Diaz that she was pregnant by him. [Hayes, SoF 39-40]. David Diaz, a sixteen-year-old Mexican-American student admitted paternity, and this fact is uncontested. David Diaz was scared by threats, with racial overtones, that Brenda's step-father would kill him if he saw Brenda again. [Birkes, SoF 166-8, 170-3; Hayes, SoF 250-3, [illegible]], and by a threatening phone call from Brenda's natural father in Oklahoma. [Hayes, SoF 250]. Throughout Brenda's pregnancy David remained in Mexia, Texas with his parents.

Brenda lived with her natural father in Oklahoma for about two months before marital problems forced her from that home also. Not knowing where to turn, Brenda's older sister arranged contact between Brenda and Angela Beyer. Brenda accepted Angela Beyer's offer of help and in December of 1978 returned to Texas. During the next two months she stayed with either Ronald and Angela Beyer in Garland, Texas, or with Ronald's mother who lived in Mexia, Texas. It was during this time that Brenda and Angela Beyer began discussing Brenda giving the expected child to the Beyers for the purpose of adoption. This developed into an understanding between Brenda and the Beyers, who agreed to pay Brenda's medical expenses and provide her a place to

stay during the pregnancy. Brenda and David claimed at trial that the Beyers exerted undue influence, and coerced Brenda to make this agreement [Hayes, SoF 376]. Angela Beyer threatened to sue Brenda's mother [Birkes, SoF 136, 155, 158; Hayes, SoF 68-70] and make arrangements for the police to take Brenda to a home for unwed mothers [Birkes, SoF 134-5; Hayes, SoF 67, 93]. Brenda was given no outside counseling by either private or public social service agencies regarding her alternatives [Hayes, SoF 279].

After Brenda's mother Dixie Marie Hensley, had permanently separated from her husband and the potential for violence reduced by a temporary injunction from the divorce court, Brenda moved back into her mother's home in Mexia, Texas in February of 1979. On March 7, 1979, Brenda gave birth to Terry Raye Starr, a baby boy, at 7:35 P.M. at the Mexia Hospital. The following morning Angela Beyer brought a one sentence statement for Brenda to sign, letting the hospital release the child to Ronald and Angela Beyer [Birkes, SoF 26; Hayes, SoF 96, 368]. The following day, less than 48 hours after this fourteen-year-old girl had given birth, Brenda was visited by her mother and Harry Fender, the attorney who was then representing Brenda's mother in her divorce suit; and unknown to Brenda had also been employed by the Beyers to draw up the papers necessary for an adoption. Without explaining who he represented, the legal consequences of the papers, or even offering to answer questions [Hayes, SoF 129-130]; Mr. Fender presented the "Affidavit of Status" and Mother's Relinquishment of Parental Rights (See Appendix F, Texas Family Code § 15.03 and § 15.04) for Brenda to read for herself and sign. The evidence at trial sharply con-

flicted over what Brenda understood about being able to change her mind. Brenda testified she understood that she had 60 days in which she *could* change her mind [Hayes, SoF 34, 85, 98]; where witnesses present at the signing testified she was told that she *could not* change her mind during the 60 day period [Hayes, SoF 150, 158-9]. Brenda appeared to know that the instrument pertained to allowing the adoption of Terry Raye. Brenda, who was described as crying [Hayes, SoF 167] or sobbing [Hayes, SoF 143] as she signed the documents, was not provided a copy. The record shows that they named David Diaz as the father of Terry Raye and appointed Brenda's *mother*, Dixie Marie Hensley as managing conservator of the child [Hayes, SoF 364, 365]. No where do they mention Ronald and Angela Beyer.

Before Brenda even had an opportunity again to hold her son, Terry Raye, he was taken from the hospital by the Beyers on March 10, 1979. Although David Diaz visited Brenda in the hospital and saw his son through a viewing window [Hayes, SoF 234]; he has never so much as held his son. The Beyer's attorney attempted to get David to relinquish his parental rights to Terry Raye, but David would not so so [Hayes, SoF 135-6, 245, 293].

On March 12, 1979, after being discharged from the hospital, Brenda sought legal counsel as to how she and David could regain care and possession of their son. Brenda wrote and sent by certified mail a letter postmarked March 15, 1979, stating that she revoked the relinquishment and requested return of her child [Hayes, SoF 17, 370-1]. On March 16, 1979 a marriage license was issued to Brenda Starr and David Diaz, and on March 18, 1979 they were legally married in Mexia,

Texas [Hayes, SoF 364]. Under Section 12.02(b) of the Texas Family Code this legitimated the infant Terry Raye Starr to David Diaz. (See Appendix F, Texas Family Code § 12.02). The next day in Dallas, Texas, the Beyers filed their original petition to terminate parental rights and to enjoin David and Brenda Diaz from disturbing their possession and such order was issued. Sometime during the next ten days the teenage couple were served in Mexia, Texas with notice of the Beyer's suit and that a hearing on a temporary injunction would be held *in Dallas* (some 80 miles from Mexia) on March 29, 1979. Despite the absence of the natural parents at this hearing, the district court in Dallas rendered a decision naming the Beyers temporary managing conservators of the child and issued a temporary injunction to prevent David or Brenda Diaz from molesting or interfering with the Beyers' possession of the child or removing the child from the jurisdiction of the court. (See Appendix B, Temporary Order in Suit Affecting Parent-Child Relationship). Brenda and David were advised by their attorney that under the terms of the injunction they could be jailed for contempt of court for trying to visit their son [Birkes, SoF 156].

On April 5, 1979, David and Brenda jointly signed and mailed to the Beyers and their attorney another statement revoking the relinquishment signed by Brenda and making demand for the return of Terry Raye [Hayes, SoF 18, 372-3]. On April 12, 1979 the Diazs filed a plea of privilege[2] challenging that the Beyers' suit was improperly brought in Dallas, Texas. The 305th District

2. Rule 86 of the Texas Rules of Civil Procedure provides for filing of a plea of privilege to be sued in the county of one's residence.

Court in Dallas treated the plea of privilege as a motion for transfer and transferred it to the 77th District Court at Groesbeck, county seat of Limestone County, Texas (where Mexia is located). Appeals by the Beyers of this transfer order effectively postponed a hearing on the merits from April, 1979, through September, 1979. Trial on the merits was then set for October, 1979. Motions for continuances further succeeded in delaying the first hearing on the merits until January 31, 1980. The court ordered social study produced affirmative evidence that Brenda and David Diaz were fit to parent and care for Terry Raye [Hayes, SoF 376] and was supported by the testimony of both grandmothers and both Brenda and David Diaz. Trial began on January 31, 1980 but was recessed, was again continued and finally reconvened and concluded on May 27, 1980. Brenda and David had tendered $100.00 as child support into the registry of the court on February 28, 1980. During the entire pending of the cause, the trial court refused to dissolve the temporary injunction or allow Brenda and David visitation rights despite their complaints that this violated their fundamental rights and was a denial of due process. The trial court finally signed a written order on July 16, 1980, which terminated the parental rights of both Brenda and David Diaz on unstated grounds, granted the adoption of Terry Raye to Ronald and Angela Beyers, and placed Brenda and David Diaz under a permanent injunction. Further, the court ordered that if the decision to terminate was reversed on appeal, the appellate court should not remand but render the case by ordering the Beyers to continue to have custody of the child, setting visitation rights for Brenda and David Diaz, and ordering them to pay child support. This latter part of the order was over-

ruled by the Court of Civil Appeals as an improper invasion into the jurisdiction of the appellate court, but was considered harmless error.

How Federal Questions Were Raised

In Texas, the party seeking to terminate parental rights has the burden of proving a listed act or omission by the parent and that termination is in the best interest of the child *Holley v. Adams,* 544 S.W.2d 367 (Tex. 1976). Each element of the listed act or omission must be proved. *Scheisser v. State,* 544 S.W.2d 373 (Tex. 1976). Trial was had based on Petitioner's "Third Amended Answer" (See Appendix G, Record Preserving Federal Question) in which they generally denied the allegation and asserted their federal claim that termination of their parental rights would violate protections guaranteed by the Due Process clause of the 14th Amendment, and that they had first and prior rights to the child, being proper persons able to care for Terry Raye. The trial court was informed of the recent Texas Supreme Court decision requiring the clear and convincing evidence standard of proof by trial brief (See Appendix G, "Memorandum of Authority"). The trial court terminated both parents' rights without stating the statutory grounds and granted the private adoption. Included in the decree was a cursory statement that the findings were supported by clear and convincing evidence. (See Appendix A, Decree of Termination and Decree of Adoption).

Petitioners filed a timely appeal in the Texas Court of Civil Appeals, raising twenty-nine points of error. The trial court's failure to specify grounds for termination made clarity difficult on appeal. The crux of Peti-

tioners' points of error was the insufficiency of the evidence to support the implied findings of the elements required for termination, especially in light of the Constitutionally imposed clear and convincing evidence standard. Within these multiple points of error Petitioners repeatedly raised that such holdings by the trial court violated their constitutional rights to the child and Due Process (See Appendix G, Record Preserving Federal Question, Appellants Brief to Court of Civil Appeals). The Court of Civil Appeals, summarily dismissed Petitioner's points of error without addressing their federal claim; and made a tenuous rationale from the record to find specific grounds for termination of parental rights (See Appendix C, Opinion, Texas Court of Civil Appeals).

The Court of Civil Appeals applied a statutory construction to Section 15.02 of the Texas Family Code that permitted termination of both mother and father without a showing of parental unfitness or detriment to the child. The Texas Court concluded that Brenda Diaz's execution of the relinquishment had constituted abandonment under Section 15.02(1)(A) and authorized termination of the parental rights of David Diaz under Section 15.02(1)(H). (See Appendix F, Texas Family Code). The court reasoned that David's personal failure to provide support and medical care was sufficient to satisfy the statute even though there was no allegation that Brenda or the child received inadequate medical care. The best interest of the child element was satisfied by comparative evidence of the potential benefits offered by the prospective adoptive parents versus the natural parents. The Court of Civil Appeals noted some evidence could be found to satisfy the clear and convincing evidence standard; there-

fore it would not upset the trial court unless it could be said the decision was so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

Petitioners sought rehearing in the Court of Civil Appeals again raising their federal claim and complaining that the appellate court had erred in finding clear and convincing evidence in the record to support termination (See Appendix G, Record Preserving Federal Question, Motion For Rehearing in the Court of Civil Appeals). The motion was denied. Petitioners made Application for Writ of Error to the Texas Supreme Court objecting to the erroneous standard of review for the clear and convincing evidence standard of proof; and reiterated their federal claim that the natural parents had been denied their Constitutional rights to their child in violation of Due Process (See Appendix G, Record Preserving Federal Question, Application for Writ of Error). The Texas Supreme Court refused the writ, no reversible error.[3] A timely motion for rehearing was made reiterating Petitioners' federal claims (See Appendix G, Record Preserving Federal Question: Application for Rehearing on Writ of Error) and was denied.

REASONS FOR GRANTING CERTIORARI

The Texas courts below decided important questions that adversely affect the dignity of a highly cherished federally protected right—that of parenthood. Last term

3. In all cases where the Texas Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all aspects has correctly declared the law, but is of the opinion that the application for Writ of Error presents no error which requires reversal, the court will deny the application with the notation "Refused. No reversible Error." *See* Rule 483, Texas Rules of Civil Procedure.

this Court said in *Lassiter v. Department of Social Services*, ____U.S.____, 101 S.Ct. 2153 (1981):

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and absent a powerful countervailing interest, protection." Here the State has sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation. A parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore a commanding one. [Citations omitted]

This commanding federal right was unconstitutionally extinguished by a Texas trial court which terminated the parental rights of Brenda and David Diaz, Petitioners, and granted a private adoption of their child to Beyers, Respondents. Thereafter, a Texas appellate court improperly upheld the termination and adoption. These acts were unconstitutional because: 1) Without demonstrating parental unfitness or detriment to the child the state's action to terminate parental rights was an impermissible invasion into the realm of constitutionally protected family life. See *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (concurring opinion); and 2) the evidence at trial was insufficient to satisfy the constitutionally required clear and convincing standard of evidence, an issue before this court and not decided last term in *Doe v. Delaware*, ____U.S.____, 101 S.Ct. 1494 (1981).

The fourteen-year-old natural mother, Brenda Starr Diaz, and her sixteen-year-old Mexican-American hus-

band, David Diaz, seek review of a decision absolutely to terminate their parental rights. Their son was taken from them by the state not because of abuse or neglect, but because a financially better situated couple desired that child. The Texas court needed no help from William Shakespeare to write a tragic story of young love in Mexia, Texas. But in writing that tragic story, fraught with its overtones of age, economic, and racial discrimination, the courts below totally ignored substantive and procedural protections developed by this Court, and in other state and federal courts. If this case is allowed to stand it will serve as a legal blue print for adoption by adverse possession.

Question 1

Can a state statute, consistent with the due process clause of the fourteenth amendment, authorize termination of parental rights without a showing of unfitness or detriment to the child?

Justice Stewart, concurring in *Smith v. Organization of Foster Families, supra* at 863 wrote:

> If a state were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the state would have intruded impermissibly on "the realm of family life which the state cannot enter." [Citation omitted]

The Texas Court of Civil Appeals ignored this teaching and construed Section 15.02 of the Texas Family Code to permit termination of parental rights without

a showing that either parent is unfit or that their actions have had any detrimental effect on their child. Such a bizarre result is contrary to all recent decisions which require an affirmative showing of parental unfitness before parental rights may be terminated. *E.g., Matter of Leon RR*, 48 N.Y.2d 117, 421 N.Y.S.2d 863, 397 N.E.2d 374 (1979); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980); *In the Interest of Brooks*, 228 Kan. 541, 618 P.2d 814 (1980); *In the Interest of Grotti*, 86 Ill. App. 3d 522, 42 Ill. Dec. 150, 408 N.E.2d 728 (1980). Similarly cases emphasize that termination of parental rights is appropriate only where the acts or omissions of the parents have been shown to harm or have a detrimental effect on the child. *Matter of Sherol A.S.*, 581 P.2d 884 (Okl. 1978); *In re Carmaleta B.*, 21 Cal.3d 482, 146 Cal. Rptr. 623, 579 P.2d 514 (1978). The Texas decision also conflicts with the analysis of the federal district court in *Alsager v. District Court*, 406 F.Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976), where it was reasoned that once a child is removed from risk of harm the state's interest is less compelling (*id.* at 22) and that termination "must occur only where more harm is likely to befall the child by staying with his parents than by being permanently separated from them." (*id.* at 24).

The Texas Court of Civil Appeals not only applied Section 15.02 of the Texas Family Code so that parental unfitness was not considered in either of the statute's elements, but also bases its decision that termination of parental rights is in the child's best interest on evidence that all recent cases consider insufficient as a basis of termination. The Texas court relied upon the evidence that the prospective adoptive parents own "their com-

fortable three bedroom, two bath brick house"; have an upper middle class income (actually citing the monthly dollar figure of each); and have adequate insurance. The court below contrasted these with the natural parents who are young, with modest income, and no insurance. Such head-to-head economic comparison between a party seeking custody and the natural parents is tantamount to holding that the rich can take the children of poor natural parents with and by sanction of legal authority. It is not unusual among the states to find specific holdings that such a comparison may not be used as the basis for termination of parental rights or permanent custody. *Carvalho v. Lewis,* 247 Ga. 44, 274 S.E.2d 471 (1981); (evidence of unfitness must be positive and non-comparative); *In the Interest of Hill,* 207 Neb. 234, 298 N.W.2d 143 (1979) (The mere fact that the adoptive parents were more educated and offered a higher standard of living is insufficient grounds to terminate); *Matter of Leon RR, supra,* (termination of parental rights may not hinge on the comparison of the relative benefits of a child by a natural family and foster family); *In re Kebler,* 51 N.D. 698, 200 N.W. 786 (1924) (poverty, lack of education, or of culture alone are never sufficient justification for severing the ties that bind families). The only other evidence noted by the court to support termination as being in the child's best interest was that the prospective adoptive parents had formed a relationship while the natural parents had not—a direct result of the trial court's own injunction. The natural parents at all times sought custody of their child but were prevented by court order from providing the parental care with which they had been endowed by nature and God. It did not disturb the court below to terminate parental rights of the natural

parents on grounds that they obeyed an existing order of that court.

Although a state has recognized interest in the welfare of its children, in promoting family stability, and resolving private disputes, the natural parents have a constitutionally protected interest in parenting their child.[4] Where important federal individual rights are involved this Court requires that fulfillment of a conflicting state interest be achieved with the least possible adverse effect on the fundamental right. *Shelton v. Tucker,* 365 U.S. 479 (1960); *Roe v. Wade,* 410 U.S. 113 (1973); *See* Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions,* 18 J. Fam. L. 79, 105 (1979). The Texas court refused viable alternatives, such as parental visitations during the pending of the trial on the merits, the award of permanent custody without severing parental rights, and the intervention of the maternal grandmother as a candidate for custodian of the child, all of which could have readily served the state's interest without inflicting total loss of a fundamental federal right. Several states have held that termination of parental rights is to be imposed only when less drastic alternatives will not suffice to serve the state's interest. *See People in Interest of C.S.,* 613 P.2d 1304 (Colo. 1980); *In the Interest of Brooks, supra; In re Angelia P.,* 28 Cal.3d 908, 171 Cal. Rptr. 637, 623 P.2d 198 (1981). The federal district court in *Alsager v. District Court, supra,* similarly applied a fundamental rights-

4. The interest of non-agency, non-relative prospective adoptive parents is not clear. *Cf., Smith v. Organization of Foster Families supra,* (Foster family's interest) and *Lassiter v. Department of Social Services, supra,* at 2160 (in North Carolina a private party has no standing to bring termination unless the child has lived with them for two years).

compelling state interest test in finding the Iowa statute unconstitutional. The Texas Court's decision to terminate the parental rights of these young parents who had not harmed or caused any detriment to their child and were capable of being parents cannot be reconciled with these decisions. Absent parental unfitness or detrimental effect upon the child there can be no state interest that justifies termination of parental rights. *Smith v. Organization of Foster Families, supra.*

Question 2

If the due process clause of the Fourteenth Amendment requires clear and convincing evidence as the standard of proof at trial in a suit for involuntary termination of parental rights, can it be circumvented on appeal by applying the scope of review normally used for preponderance of the evidence?

This petition presents the same standard of proof question in a termination of parental rights case that was before this Court last term in *Doe v. Delaware, supra.* Dissenting from the dismissal of that appeal, Justice Stevens wrote: [J]ustice requires that we promptly resolve the critical federal question . . . because . . . [it] is certain to reappear before us in the same form at a later date. Accordingly, I would decide the standard-of-proof question." *Id.* at 1503. This Court is asked now to decide that clear and convincing evidence standard of proof is required to terminate parental rights following the precedent set in *Addington v. Texas,* 441 U.S. 418 (1979) (clear and convincing evidence required for involuntary mental health commitment). Further it is urged that this Court make clear the practical effect of this higher standard of proof by establishing a scope of ap-

pellate review that rationally corresponds. *See Jackson v. Virginia,* 443 U.S. 307 (1979).

The Texas Court below purported to apply the clear and convincing evidence standard of proof that the Texas Supreme Court held is constitutionally required in a suit to terminate parental rights. *See In the Interest of G.M.,* 596 S.W.2d 846 (Tex. 1980). Petitioners do not complain of the standard of proof applied at the trial court as being inadequated to satisfy Due Process, but rather that no rational trier of fact could conclude that the findings in this case were supported by clear and convincing evidence. On appeal, the Texas court limited its review of this standard of proof to a determination of whether the findings of the trial court are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, the standard of review normally applied to the preponderance standard of evidence. *See In re King's Estate,* 150 Tex. 662, 244 S.W. 2d 660 (1951). By applying an improper standard of review the appellate court perpetuated the error of the trial court.

In *Addington v. Texas, supra,* this Court described the function of the standard of proof as it is embodied in the concept of Due Process: 1) it instructs the fact finder in the degree of confidence that society places on the correctness of the factual conclusion of that particular type of adjudication, 2) it allocates the risk of error between the litigants, 3) it indicates the relative importance placed on the ultimate decision, and 4) it is important for its symbolic meaning as well as practical effect. In balancing the liberty interest of the natural parents in maintaining parental rights and the state's interest in

the welfare of children the better reasoning would place more than a mere equal sharing of the risk of an erroneous decision on one who would seek to terminate parental rights. *See Woodby v. I.N.S.*, 385 U.S. 276 (1967); *Chaunt v. United States*, 364 U.S. 350 (1960); *Schneiderman v. United States*, 320 U.S. 118 (1943). Many states now require the clear and convincing evidence standard of proof in a suit to terminate parental rights. *E.g., In the Matter of C.L.T.*, 597 P.2d 518 (Alaska 1979); *In re Adoption of Baby Boy*, 106 Ariz. 195, 472 P.2d 64 (1970); *In re Angelia P., supra; In the Interest of Grotti, supra; In the Interest of Brooks, supra; Matter of Welfare of Rosenbloom*, 266 N.W.2d 888 (Minn. 1978); *In re Interest of Souza*, 204 Neb. 503, 283 N.W. 2d 48 (1979); *In re Guardianship of B.C.H.*, 108 N.J. Super. 531, 262 A.2d 4 (1970); *Hollick v. McDaniel*, 401 P.2d 466 (Okl. 1965); *In the Interest of G.M., supra; In re Sego*, 82 Wash. 2d 736, 513 P.2d 831 (1973); *In re Simmons Children*, 177 S.W.2d 19 (W. Va. 1970). The clear and convincing evidence standard is consistent with a federal district court's decision that an Iowa Statute that provided for mere preponderance of the evidence was unconstitutional because the burden of proof failed to satisfy requirements of Due Process. *Alsager v. District Court, supra.*[5]

Moreover, authority exists for requiring the highest burden of proof known to the law in a termination of parental rights adjudication. After considering the fundamental nature of the right involved, the Supreme Court of New Hampshire has twice stated the standard of proof

5. The U.S. Court of Appeals for the Eighth Circuit, in affirming one district court, expressly left open the burden of proof issue. *Alsager v. District Court*, 545 F.2d 1137 (8th Cir. 1976).

required to terminate is beyond a reasonable doubt *State v. Robert H.*, 118 N.H. 713, 393 A.2d 1387 (1978); *In re Diana P.*, ____N.H.____, 424 A.2d 178 (1980). The United States Congress has also chosen the beyond a reasonable doubt standard of proof before the parental rights of an Indian parent may be terminated *Indian Child Welfare Act of 1978*, 25 U.S.C. § 1912(f). This standard of proof was required because Congress felt permanent removal of a child from its parents and termination was a penalty as great, if not greater, than a criminal penalty. *See House Report No. 95-1386, reprinted in* [1978] *U.S. Cong. Code. & Adm. News 7530, 7545.*

The preponderance of the evidence standard that is generally applicable to a civil case such as an automobile negligence suit, is applied in some states to an adjudication for termination of parental rights. *In re Adoption of M.M.*, 424 A.2d 1280 (Pa. 1980); *State v. Anonymous*, 179 Conn. 155, 425 A.2d 939 (1979); *Custody of a Minor*, 389 N.E.2d 68 (Mass. 1979).

If this Court decides that clear and convincing evidence standard of proof is required at trial, this Court is then asked to decide the standard of review issue. Although the clear and convincing evidence standard of proof is no stranger to civil law, *Addington v. Texas, supra*, it is relatively new as a constitutionally imposed substantive standard to be applied by state courts. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Addington v. Texas, supra.* For there to be a real, practical effect for this higher standard of proof the appellate court must apply a corresponding higher standard of review. Further that standard must be determined by this

Court. This is so both because chaos would otherwise exist and because the standard is constitutional. At the present time state courts apply varying and questionable standards of review to the clear and convincing evidence of proof. In this case the Texas court refused to reverse the trial court unless it could be said the evidence was against the great weight and preponderance as to be manifestly wrong or unjust. *See* Appendix C, Opinion of the Court of Civil Appeals. Arizona applies a standard of review reversing when the decision is clearly erroneous, with no reasonable evidence to support. *Matter of Severance Action No. S110,* 27 Ariz. App. 553, 556 P.2d 1156 (1976). Illinois appellate court would not disturb the decision below to terminate unless it was palpably against the manifest weight of the evidence. *In the Interest of Grotti, supra.* The Minnesota Supreme Court would reverse a decision to terminate parental rights only if clearly erroneous, yet because of the nature of the right, would exercise great caution in review. *Matter of Welfare of Solomon,* 291 N.W.2d 365 (Minn. 1980). This chaos will end only when this Court announces a uniform standard of review.

When Due Process requires a higher standard of proof the standard for review is also constitutional. "A doctrine establishing standard [the beyond a reasonable doubt standard of proof in criminal cases] must also require that the fact finder will rationally apply that standard to the facts in evidence." *Jackson v. Virginia, supra.* The Texas court ignored this precedent set by this Court for the appropriate review to insure Due Process protection offered by a substantial constitutional standard of proof. The California Supreme Court applied an appropriate

standard of review as explained by this Court, to the clear and convincing evidence standard that it has held is required by Due Process in a termination of parental rights case. The standard of review is whether after viewing the entire record in the light most favorable to the decision below, any rational trier of fact could conclude the decision was supported by clear and convincing evidence. *In re Angelia P., supra.* If the Texas Court of Civil Appeals had applied this standard of review in this case the trial court's decision to terminate and grant the adoption would have been reversed.

CONCLUSION

America has been built on the foundation of the family and of the paramount constitutional rights of the parents to their child.

The trial court and the appellate courts took the infant son, Terry away from David and Brenda. These parents were found fit as parents by the state social study and were not found unfit or detrimental by the courts. These holdings means a child, with proper and qualified parents can be taken away and deprived of his rightful parents and the parents deprived of their child if wealthier adoptive parents stand ready to take the child. The Texas law of acquiring land by adverse possession is being used by the Texas courts here to acquire a child by adverse possession. Terry's parents were enjoined by the Courts from having possession of him from the 12th day of birth for 16 months when the parent-child relationship was severed by the trial court and Brenda and David forever deprived of Terry.

Lassiter v. Department of Social Service, supra states "due process" "is fundamental fairness".

Brenda, David and Terry did not receive "Fundamental fairness" from the Texas courts.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642
(817) 729-3211
Bar Card No. 07816000
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition of Writ of Certiorari filed on behalf of Petitioners David Diaz, Brenda Starr Diaz and Dixie Marie Hensley were duly served upon Respondents Ronald Beyer and Angela Beyer by placing same in the United States mail first class postage prepaid, certified return receipt requested, addressed to Mr. J. Preston Brashear, III, 1580 Eastgate, Suite 320, Garland, Texas 75041 and to Mr. Joe Cannon, Cannon Building, Groesbeck, Texas 76642, attorneys for Respondents and by placing three (3) copies of said petition in the United States mail first class postage prepaid, certified return receipt requested addressed to Mr. Dale Hamilton, 202 East Milam, Mexia, Texas 76667, Guardian ad litem for the infant, Terry Raye Starr Diaz (Beyer) on this the _____ day of September, 1981.

L. L. GEREN
Attorney for Petitioners

Appendix

APPENDIX A

ORIGINAL DECISION OF THE TRIAL COURT FILED JULY 16, 1980

IN THE 77TH DISTRICT COURT OF
LIMESTONE COUNTY, TEXAS;

NO. 18,610-A

IN THE INTEREST OF
TERRY RAYE STARR, A CHILD

DECREE OF TERMINATION
AND DECREE OF ADOPTION

On the 31st day of January, 1980, Petitioners RONALD BEYER and ANGELA BEYER, appeared in person and by attorney and announced ready for trial. Respondents, BRENDA SUE STARR DIAZ, DAVID DIAZ, and DIXIE HENSLEY, appeared in person and by attorney and announced ready for trial. Also appearing was DALE HAMILTON, appointed by the Court as attorney ad litem for TERRY RAYE STARR, who is a minor.

Trial was recessed on February 1, 1980, and resumed on May 27, 1980.

The Court, having examined the pleadings and heard the evidence and argument of counsel, finds that it has jurisdiction of this cause and of all the parties and that no other court has continuing, exclusive jurisdiction of this cause. A jury was waived, and all matters in controversy, including question of fact and of law, were sub-

mitted to the Court. All persons entitled to citation were properly cited.

The Court finds that the following child is the subject of this suit:

NAME: TERRY RAYE STARR SEX: MALE

BIRTHPLACE: Mexia, Limestone County, Texas

BIRTHDATE: March 7, 1979

PRESENT RESIDENCE: 1813 Meridian, Garland, Dallas County, Texas

IT IS THEREFORE DECREED that the parent-child relationship between BRENDA STARR DIAZ and the child the subject of this suit be and it is hereby terminated.

IT IS FURTHER DECREED that the parent-child relationship between DAVID DIAZ and the child the subject of this suit be and it is hereby terminated.

The Court finds and decrees that DIXIE HENSLEY has no legal rights in the child who is the subject of this suit.

The Court finds that the child has lived in the home of Petitioners for at least six months. The Court finds that the required social study has been made and is on file herein. The Court finds that the Temporary Managing Conservators herein are the Petitioners and have therefore consented to this adoption.

The Court finds that all prerequisites and requirements for adoption have been met and that adoption is in the best interest of the child.

IT IS DECREED that the adoption of the above described child the subject of this suit by Petitioners be and

is hereby granted and that the parent-child relationship shall henceforth exist between the child and each of the Petitioners RONALD BEYER AND ANGELA BEYER.

IT IS FURTHER DECREED that the child the subject of this suit shall henceforth have the legal name of TERRY RAYE BEYER.

The Court finds that the child adopted is a citizen by birth of the United States of America.

IT IS FURTHER ORDERED that the Clerk of this Court shall, after entry of final orders in this cause, transmit to the State Department of Human Resources at Austin, Texas, certified copies of the Petition and Judgment in this case; all other papers and records, including the minutes of the Court, in this case are ordered sealed.

The Court finds that immediate and irreparable injury, loss or damage, as alleged, will result to the safety and welfare of the child and of Petitioners unless the permanent injunction set forth herein is granted, and that Petitioners and the child have no adequated remedy at law. The Court deems the following orders necessary for the safety and welfare of the child. The requirement of a bond is hereby dispensed with.

IT IS ORDERED that BRENDA SUE STARR DIAZ and DAVID DIAZ and DIXIE HENSLEY, Respondents, are permanently enjoined from:

> Molesting or disturbing the child or petitioners or interfering in any way with Petitioners' possession of the minor child by taking or attempting to take possession of the child, directly or through any other person, from the residence or any other place.

Removing the child from the jurisdiction of the Court, and communicating with the child or Petitioners.

The Court further finds that, in the event that it should be determined that the Court is in error in terminating the parental rights of BRENDA SUE STARR DIAZ and DAVID DIAZ, then the best interest of the child nevertheless require that he remain in the home of Petitioners, and that RONALD BEYER be appointed as Managing Conservator of the child. If such termination is determined to be improper, and only in that event, then BRENDA SUE STARR DIAZ and DAVID DIAZ should be appointed as Possessory Conservators of the child, to have possession of the child as follows:

> on the first Saturday of each month from 9:00 a.m. until the immediately following Sunday at 5:00 p.m., and for fourteen consecutive days during the months of June, July or August, of each year, upon giving 30 days notice in writing to the Managing Conservator by certified mail, return receipt requested, and in even numbered years for the Easter holiday beginning at 6:00 p.m. on Good Friday through 5:00 p.m. on Easter Sunday, and From 5:00 p.m. on December 22 until 5:00 p.m. on December 25 for Christmas holidays, and in odd numbered years on Thanksgiving Day beginning at 9:00 a.m. on Thursday morning through the following Sunday at 5:00 p.m. and on December 25 at 5:00 p.m. until December 28 at 5:00 p.m. for the Christmas holidays.

The Court further finds that, in the event that it should be determined that such termination of parental rights is

improper, and only in that event, then BRENDA SUE STARR DIAZ should pay child support in the amount of $40.00 per month and DAVID DIAZ should pay child support in the amount of $60.00 per month, such support to be paid through the Registry of the Court to the Managing Conservator on the first day of each month, with the first payment being due on the first day of the month following the final ruling by any appellate court that such parental rights should not be terminated.

Each of the foregoing findings which is conditioned upon a determination that the Court was in error in terminating the parental rights of BRENDA SUE STARR DIAZ and DAVID DIAZ is a finding by the Court as to the best interest of the child in such event only, and the determination referred to in each of these findings shall be a final ruling by an appellate court rendering judgment as to such termination and not a remand for re-trial or further proceedings.

Each of the findings contained in this Decree of Termination and Decree of Adoption is based upon clear and convincing evidence.

IT IS DECREED that DALE HAMILTON be and is hereby awarded the sum of $1,000.00 as a reasonable fee for his services as attorney ad litem for the child in this cause, which sum shall be paid by Petitioners to him.

Costs herein are taxed against the Respondents.

IT IS DECREED that all relief requested in this cause and not expressly granted herein be and is hereby denied.

To all of which the Respondents in open court duly excepted and gave notice of appeal to the Court of Civil Appeals.

SIGNED this the 16th day of July, 1980.

/s/ PUTNAM KAY REITER
District Court Judge

APPENDIX B

IN THE 305TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

IN THE INTEREST OF TERRY RAYE STARR,
A CHILD

TEMPORARY ORDERS IN SUIT AFFECTING
THE PARENT-CHILD RELATIONSHIP

On the 29th day of March, 1979, came on to be heard the application of Petitioners for temporary orders.

RONALD BEYER and ANGELA BEYER, appeared in person and by attorney and announced ready.

BRENDA SUE STARR and DAVID DIAZ, Respondents, although duly and properly cited, did not appear.

The Court, having considered the pleadings and heard the evidence and argument of counsel, finds that all necessary prerequisites of the law have been legally satisfied and that this Court has jurisdiction over the parties and subject matter of this cause.

The Court finds that the following orders for the safety and welfare of the child are in the best interest of the child:

IT IS ORDERED that RONALD BEYER and ANGELA BEYER be and they are hereby appointed Temporary Managing Conservators of the following child: TERRY RAYE STARR.

IT IS ORDERED that the Temporary Managing Conservators shall have all the rights, privileges, duties, and powers of a parent, to the exclusion of the natural parents.

IT IS ORDERED that *Jerry Pittman* be appointed *Guardian* ad litem to represent the interest of the child.

The Court finds that immediate and irreparable injury, loss, or damage, as alleged, will result to the safety and welfare of the child and of Petitioners unless the temporary injunction set forth herein is granted and that Petitioners have no adequate remedy at law. The Court deems the following orders necessary for the safety and welfare of the child. The requirement of a bond is hereby dispensed with.

IT IS ORDERED that BRENDA SUE STARR and DAVID DIAZ, Respondents, are enjoined from:

> Molesting or disturbing the child or Petitioners interfering in any way with Petitioners' possession of the minor child by taking or attempting to take possession of the child, directly or through any other person from the residence or any other place. Removing the child from the jurisdiction of the Court.

All said temporary orders shall continue in force during the pendency of this suit or until further order of this Court.

SIGNED this 2nd day of April, 1981.

/s/ PAT McCLUNG

APPENDIX C

David DIAZ, et ux, et al, Appellants,

v.

Ronald BEYER, et ux, Appellees.

No. 6265

Court of Civil Appeals of Texas,
Waco.

Jan. 30, 1981.

Rehearing Denied Feb. 19, 1981

OPINION

JAMES, Justice.

This is a suit for termination of the parent-child relationship between the child who is the subject of this suit, to wit, Terry Raye Starr, and his natural parents, to wit, Respondent-Appellants Brenda Starr Diaz and David Diaz, and for the adoption of the child by Petitioner-Appellees, to wit, Ronald Beyer and wife Angela Beyer. The Beyers are not related to the child.

This suit was filed by the Beyers originally in Dallas County against Brenda and David Diaz to terminate the parent-child relationship under the provisions of Article 15.02 of the Texas Family Code. A temporary restraining order was issued by the Dallas County District Court enjoining Brenda and David Diaz from interfering with the Beyers's possession of the child. Petitioner-Appellees, the Beyers, later amended their pleadings to include Dixie

Marie Hensley, the maternal grandmother of the child, as a Respondent.

Respondent-Appellants (the Diaz couple and Mrs. Hensley) filed a plea of privilege (which was later deemed to be a Motion to Transfer) seeking to have the case transferred to Limestone County. After hearing such plea was sustained, and the cause was transferred to Limestone County.

Trial was had upon the merits before the court without a jury, after which the trial court entered judgment terminating the parent-child relationship between the child and its natural parents, and granting the adoption of said child by Mr. and Mrs. Beyer. In addition thereto the trial court permanently enjoined Respondents from interfering in any way with the Beyers's possession of the child. From this judgment the Respondents appeal.

No findings of fact or conclusions of law were requested of or filed by the trial court.

Respondent-Appellants come to this court on twenty-nine points of error. Numbers 1 through 17, inclusive, as well as Numbers 23, 24, 28 and 29 assert the trial court erred in terminating the parent-child relationship and in granting the adoption of the child for the stated reason that such findings are against the great weight and preponderance of the evidence and are not supported by clear and convincing evidence.

We have carefully considered all of Respondent-Appellants' points and contentions and hereby overrule all of same and affirm the trial court's judgment.

Brenda Sue Starr at the age of fourteen was unmarried and became pregnant in July or August 1978. She iden-

tified David Diaz, aged sixteen, as the father of her expected child, and he admitted to such paternity. At the time she became pregnant, Brenda was living with her mother, Mrs. Dixie Marie Hensley, and her stepfather, Denmond Hensley, at Mexia, Texas. Some discord developed in this situation. Brenda testified that her stepfather demanded that she get an abortion, which she refused to do; whereupon it was determined that she and her sister Linda should go to Enid, Oklahoma, to live with their natural father, Parley Starr and his wife. David Diaz learned of Brenda's pregnancy when she (Brenda) was three or four months pregnant.

After Brenda and Linda had been with their father in Oklahoma about two months, they left due to some marital discord between their father and his wife. At the encouragement of Linda, Brenda went to stay with Ronnie and Angela Beyer at their home in Garland, Texas. It was at this time there was a discussion between Brenda and Angela Beyer with reference to Brenda giving the expected child to Mr. and Mrs. Beyer for purposes of adoption on the part of the Beyers. This discussion developed into an agreement between Brenda and the Beyers whereby Brenda would allow the Beyers to take the baby at its birth and adopt it. It was further agreed that the Beyers would see that Brenda received proper medical care and a place to live during the pregnancy. Brenda then in December 1978 went to Mexia, Texas, to live in the home of Mrs. Willie Mae Beyer, the mother of Ronnie Beyer, where she stayed for about two months until February 1979. Meanwhile, Brenda's mother, Dixie Marie Hensley, and her stepfather, Denmond Hensley, had separated; whereupon in February 1979 Brenda went

to live with her mother in Mexia, Texas, where she was residing at the time the child was born on March 7, 1979.

The Beyers paid all of the doctor's and hospital bills incident to the childbirth except for one X-ray costing $20.00 which was paid for by Dixie Marie Hensley. After the child was born, Brenda never saw the child but one time, that being through a window in the maternity ward at the hospital.

The Beyers employed Honorable Harry Fender, an attorney, to handle the adoption proceedings. After the child was born, Brenda's mother, Dixie Marie Hensley, on March 9, 1979, drove Mr. Fender to the hospital, on which occasion he presented to Brenda three written instruments, one being an Affidavit of Relinquishment of Parental Rights, another was entitled, "Affidavit of Status", and the third was a written direction to the hospital to release the baby to Mr. and Mrs. Beyer. Mr. Fender testified that when he presented these papers to Brenda that he told her if she had any question about them to let him know. Brenda read the papers and signed them. The Affidavit of Relinquishment of Parental Rights was also signed by two witnesses, and sworn to by Brenda and said witnesses. This instrument provided that it was irrevocable for 60 days and that the affiant understood that her parental rights would probably be terminated by legal action within the 60 day period. It further provided for waiver on Brenda's part of any process in connection with any suit to terminate her parental rights.

The "Affidavit of Status" in effect recited that Brenda was unmarried, that paternity of the child had not been established by law, and that David Diaz is the father of the child. This instrument was signed by Brenda and

two witnesses. The third instrument, which authorized the hospital to deliver the baby over to Mr. and Mrs. Beyer, was also signed by Brenda.

The next day after the above instruments were signed, to wit, on March 10, 1979, the Beyers took possession of the child, and said child has lived ever since said time in the Beyer home at Garland, Texas.

On March 18, 1979, Brenda Starr and David Diaz were married. This suit was originally filed by the Beyers on March 19, 1979, in a Dallas County District Court, which court on that same day issued a temporary restraining order against Brenda and David. A temporary injunction hearing was set for March 29, 1979, at which hearing neither Brenda nor David nor their attorney appeared, whereupon a temporary injunction issued. On April 2, 1979, said Dallas Court signed an order appointing Ronald and Angela Beyer as Temporary Managing Conservators of the child.

As noted, David Diaz learned of the pregnancy when Brenda was three or four months pregnant; however, he did not contribute anything toward the support of the mother or of the child at any time either before or after the birth of the child, except for $100.00 deposited in the registry of the court, hereinafter discussed. David testified that he did not come around Brenda after he learned of her pregnancy, and did not contribute to her support because he had been threatened and warned by her stepfather, Denmond Hensley, and her father, Parley Starr, to stay away. However, the record does not show that either Denmond Hensley or Parley Starr ever warned David Diaz against paying any money toward Brenda's or the child's support. The record showed that David

was gainfully employed most of the time pertinent to this lawsuit. On February 26, 1980, which was at a time after the trial commenced, David and Brenda Diaz tendered into the registry of the court $100.00 as child support of the child. This is the only money paid or attempted to be paid by David Diaz towards support of the child.

Article 15.02 of the Texas Family Code, entitled, "Involuntary Termination of Parental Rights", in its pertinent parts provides:

> "A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:
>
> (1) the parent has:
>
> (A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or—"
>
> * * * * *
>
> (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;"
>
> * * * * *
>
> "and in addition, the court further finds that
>
> (2) termination is in the best interest of the child."

Our Supreme Court has recently held that the facts in an involuntary parent-child termination proceeding must

be proved by the "clear and convincing evidence" standard. *In the Interest of G. M. et al* (Tex. 1980) 596 S.W. 2d 846. "Clear and convincing evidence" is defined by our Supreme Court as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. While the (state's) proof must weigh heavier than merely the great weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed." *State v. Addington* (Tex. 1979) 588 S.W.2d 569.

The statement of facts in the case at bar consists of 546 pages plus several exhibits. The facts have been fully developed. The evidence is sharply conflicting concerning many aspects of the case.

Appellants urge in regard to David Diaz that while it is true that he did not marry Brenda Diaz on learning of her pregnancy and stayed away from her until after the child was born, that such was done out of fear for his life, as the evidence showed that he had been threatened by both Brenda's father and stepfather. It is also contended by Appellants that the trial court ignored the fact that David Diaz was the legitimate father of Terry Raye Starr by virtue of his having married Brenda Starr after the birth of the child as provided in Section 12.02(a) of the Texas Family Code; and that in order to allow the Beyers to adopt the child, the court must first terminate his parental rights. In regard to Brenda Diaz's parental rights, Appellants argue that while she signed an Affidavit

of Relinquishment, that such was done under duress, in pain, while frightened, forlorn, rejected and neglected, and that such has been repeatedly revoked, both before and after the sixty day period during which it was stated to be irrevocable.

Appellees' position is that the trial court did not err in terminating the parental rights of David Diaz as the evidence supports the contention that David Diaz is the legitimate father of the child, but that his parental rights should be terminated based on his abandonment of the mother, Brenda Starr Diaz, during her pregnancy and his subsequent failure to support the child, coupled with the finding that it is in the best interests of the child to have such parental rights terminated. Appellees urge that in regard to the termination of Brenda Diaz's parental rights the court was also not in error. While recognizing that she had few choices available to her, and that such a situation would be difficult for a fourteen year old girl, we believe that the evidence clearly shows that her decision to sign the Relinquishment was voluntary, there being no fraud, overreaching or coercion involved, and that therefore the decision of the trial court should be upheld.

In our opinion the evidence shows that David Diaz, having known of Brenda's pregnancy since the third or fourth month, abandoned her until after the child was born. David contends that this was because of threats he received from Brenda's father and stepfather. However, he never offered to pay, and did not pay, any of the medical expenses, although by his own testimony he was never warned by any of the threats against paying. After the child was born he has remained away from it. He explains this as being necessary because an injunction

prevents him from visiting the child. The injunction actually enjoins Brenda and David from "Molesting or disturbing the child of Petitioners (the Beyers) or interfering in any way with Petitioners' possession of the minor child by taking or attempting to take possession of the child, directly or through any other person from the residence or any other place." and from: "Removing the child from the jurisdiction of the Court." It seems to us that this injunction by its language did not prohibit visitation of the child, but rather only the specific acts stated therein. In any event the injunction did not prohibit sending money to support the child or inquiring as to its welfare, and neither of these has been done by David or Brenda Diaz except as to the $100.00 deposited in the registry of the court after trial commenced. David Diaz legitimated the child by marrying Brenda Starr following the birth of the child, as provided by Article 12.02(a) of the Family Code. At that time therefore he, as the legitimate father, was subject to having his parental rights terminated. In our opinion, the provisions of Subdivision (1)(H) of Article 15.02 as hereinabove quoted have been met insofar as David Diaz is concerned.

With reference to Brenda Starr Diaz, the evidence shows that the Affidavit of Relinquishment was signed and properly executed by her. There was testimony that at the time of the signing (which was two days after the birth of the child), she did not appear to be in pain and was not under the influence of any drugs. Moreover, the evidence shows that Brenda read the papers before she signed them, and that she stated that she understood by them she was giving up the baby. Her mother brought the lawyer to the hospital with the papers to sign, and there is no assertion or accusation that Brenda had any

fraud, coercion, or undue influence practiced upon her. If she was coerced at all, it was only by the circumstances. See *Myers v. Patton* (Texarkana Tex. Civ. App. 1976) 543 S.W.2d 22, no writ, where the issue was the voluntariness of the signing of the affidavit. There the court said that "the force of adverse circumstances (that it would be difficult for the mother to take care of the child) might cause the mother to consent to termination and adoption, but the pressure of those circumstances was the result of the illicit acts of (Appellant) and not due to any overreaching, fraud, or misrepresentation on the part of the (Appellee)." Appellants urge that the relinquishment was revoked in writing several times both before and after the sixty day period of irrevocability. Here, the Beyers took the baby when it was three days old, paid all medical bills, filed this suit, and made a home for the child, all within the 60 day period. Since the birth of the child, neither Brenda nor David have made any effort to see the child. Therefore we believe there is ample proof in the record that Brenda has fulfilled the requirements of Subdivision (1)(A) of Article 15.02 in that she has "voluntarily left the child—in the possession of another not the parent and expressed an intent not to return."

Under Article 15.02 of the Family Code, termination of the parent-child relationship may not be based solely upon what the trial court determines to be in the best interest of the child. One or more of the acts or omissions listed in Subdivision (1) must be proved in a termination case, and in addition thereto Subdivision (2) requires proof that the termination is in the best interest of the child. Both elements must be established and the requirements of Subdivision (1) are not excused because a court

may be of the opinion that Subdivision (2) has been proved. *Wiley v. Spratlin* (Tex. 1976) 543 S.W.2d 349; *Holley v. Adams* (Tex. 1976) 544 S.W.2d 367; also see *In the Interest of Jones* (Tyler Tex. Civ. App. 1978) 566 S.W.2d 502, NRE.

It is our view of the case that the evidence is clear and convincing that Brenda "voluntarily left the child—in the possession of another not the parent and expressed an intent not to return" as provided by Subdivision (1)(A) of Article 15.02, and that David "voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child,—and failed to support the child since the birth," under the provisions of Subdivision (1)(H) of Article 15.02. This being so, the only remaining question in regard to whether the parental rights were properly terminated is whether such is in the best interest of the child.

At the time of trial Brenda was fifteen years old and David was seventeen years old. They were living together in Mexia, Texas, in a home owned by Denmond Hensley, Breda's former stepfather, paying $100.00 per month rent, which amount was admittedly less than the house would normally rent for. David worked at a machine shop with his father, while Brenda was baby-sitting. Brenda testified that the net take home pay of both her and David was about $150.00 per week. The evidence showed that they had no telephone, no car, no life, health or accident insurance, and no savings except what is "left over" in their checking account which they do not

balance. Neither finished high school, and they have no definite plans for further training or education. Their responses concerning the future of the child should they have him were characterized by a social worker as immature." As noted, David has never seen the child, while Brenda saw him only one time through a window of the maternity ward at the hospital before the child was removed from the hospital.

In contrast, Ronald and Angela Beyer are more mature, he being 36 years old and she being 28 years old. They live in a comfortable three bedroom, two bath brick house valued at $45,000.00 in Garland, Texas. They have an 8 year old child of their own in addition to Terry Raye, who was a little over one year old at the time of the trial. Terry Raye has been in their home constantly since he was three days old. All four in the family unit have grown very attached to each other. Ronald Beyer is a foreman at Rockwell International, where he has worked since 1962. He earns $1,560.00 per month gross, or about $1,200.00 per month net. Mrs. Beyer is employed at Texas Instruments, where she has worked since 1978, and earns $626.00 per month gross. They have life insurance, and health, accident and hospitalization insurance. Testimony shows that the Beyers love the child, want to adopt him, and are financially able to support him.

In viewing the entire record in this case and applying the clear and convincing standard of proof, we believe that such evidence justified the trial court in terminating the parental rights of David and Brenda Diaz and granting the adoption of the child by Ronald and Angela Beyer. Moreover, we cannot say that said findings of the

trial court are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, under the doctrine of *In Re King's Estate* (1951) 150 Tex. 662, 244 S.W.2d 660. We therefore affirm the trial court's judgment.

Appellants by their eighteenth point of error complain of language in the trial court's judgment to the effect that the appellate courts would be compelled to either affirm the trial court's judgment of termination and adoption, or else to order that the child remain with Petitioner-Appellees the Beyers. Said judgment in effect recites that if the trial court is adjudged to be in error in the termination of parental rights, that the trial court nevertheless appoints the Beyers as Managing Conservators of the child, with certain visitation rights awarded to Brenda and David Diaz, with the further provision that in such event that the Diazes would be required to pay $100.00 per month child support. The judgment goes on to say: "—and the determination referred to in each of these findings shall be a final ruling by an appellate court rendering judgment as to such termination and not a remand for retrial or further proceedings."

Appellant contends that these provisions of the judgment are improper. We sustain this point of error, since these provisions are calculated to invade the jurisdiction of the appellate courts. However, under our view of the case, these provisions become moot; therefore such error is harmless.

We have carefully considered all of the remaining points and contentions of Appellants, and overrule same. Judgment of the trial court is accordingly affirmed.

AFFIRMED.

TO THE 77TH JUDICIAL DISTRICT COURT OF LIMESTONE COUNTY, GREETING:

Before our Court of Civil Appeals on the 30th day of January A.D. 1981, the cause upon appeal to revise or reverse your judgment between

David Diaz, et ux, et al, Appellant,

and

No. 6265

Ronald Beyer, et ux, Appellee,

was determined; and therein our said Court of Civil Appeals made its order in these words:

"Came on to be heard on the transcript of the record in Cause No. 6265 entitled David Diaz, et ux, et al, Appellants, vs. Ronald Beyer, et ux, Appellees, from the 77th Judicial District Court of Limestone County, Texas; and the same being considered, it is the opinion of the Court there is no error in the judgment; it is therefore ordered, adjudged and decreed that the judgment of the trial court entered on the 16th day of July, 1980 be, and hereby is, AFFIRMED. It is further ordered that the Appellants, David Diaz, Brenda Sue Starr and Dixie Marie Hensley, who have a cash deposit with the District Clerk of Limestone County, Texas in lieu of an appeal bond, pay all costs in this behalf expended, and this decision be certified below for observance. Opinion by Justice John A. James, Jr."

WHEREFORE WE COMMAND YOU to observe the order of our said Court of Civil Appeals in this behalf, and in all things to have it duly recognized, obeyed and executed.

WITNESS the Hon. FRANK G. McDONALD, Chief Justice of our said Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, with the seal thereof annexed, at the City of Waco, this 23rd day of June A.D. 1981.

/s/ Robert G. Watts, Clerk

APPENDIX D

ORDER OVERRULING MOTION FOR REHEARING

Court of Civil Appeals
Tenth Supreme Judicial District

February 19, 1981

Re: Cause No. 6265
David Diaz, et ux, et al
v. Ronald Beyer, et ux
From: Limestone County

Appellants' Motion for Rehearing in the above cause was this day OVERRULED by this Court.

/s/ Robert G. Watts, Clerk

APPENDIX E

Orders of the
Texas Supreme Court

NO. C-216

DAVID DIAZ ET AL.

v.

RONALD BEYER ET UX.

From Limestone County,
Tenth District

May 6, 1981

Application of petitioners for writ of error to the Court of Civil Appeals for the Tenth Supreme Judicial District together with petitioners' motion to amend the application for writ of error having been duly considered, it is ordered that the motion to amend be, and hereby is, granted, and the Court having determined that the amended application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said amended application be, and hereby is, refused.

It is further ordered that applicants, David Diaz et al., pay all costs incurred on this application.

E-2

From Limestone County, Tenth District

June 17, 1981

DAVID DIAZ ET AL.

v.

RONALD BEYER ET UX.

Motion for rehearing of application for writ of error on behalf of David Diaz et al., together with motion for rehearing directed at the granting of the motion to amend application on behalf of Ronald Beyer et ux., having been duly considered, it is ordered that said motions be, and hereby are, overruled.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment to United States Constitution [Applicable Part]

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS FAMILY CODE PROVISIONS

Section 11.01. *Definitions*

As used in this subtitle and Subtitle C of this title,[1] unless the context requires a different definition:

(3) "Parent" means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.

(4) "Parent-child relationship" means the rights, privileges, duties, and powers existing between a parent and child as provided by Section 12.04 of this code.

Section 12.02. *Relation of Child to Father*

(a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother.

(b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conveived before or during the attempted marriage

(c) A child is the legitimate child of a man if the man's paternity is established under the provisions of Chapter 13 of this code.

Section 12.04. *Rights, Privileges, Duties, and Powers of Parent*

Except as otherwise provided by judicial order or by an affidavit of relinquishment of parental rights executed under Section 15.03 of this code, the parent of a child has the following rights, privileges, duties, and powers:

(1) The right to have physical possession of the child and to establish its legal domicile;

(2) the duty of care, control, protection, moral and religious training, and reasonable discipline of the child;

(3) the duty to support the child, including providing the child with clothing, food, shelter, medical care, and education;

(4) the duty to manage the estate of the child, except when a guardian of the estate has been appointed;

(5) the right to the services and earnings of the child;

(6) the power to consent to marriage, to enlistment in the armed forces of the United States, and medical, psychiatric, and surgical treatment;

(7) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

(8) the power to receive and give receipt for payments for the support of the child and to hold or disburse any funds for the benefit of the child;

(9) the right to inherit from and through the child; and

(10) any other right, privilege, duty, or power existing between a parent and child by virtue of law.

Section 15.02. *Involuntary Termination of Parental Rights*

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment

of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

Section 15.03. *Affidavit of Relinquishment of Parental Rights*

(a) An affidavit for voluntary relinquishment of parental rights must be signed after the birth of the child by the parent, whether or not a minor, whose parental rights are to be relinquished, witnessed by two credible persons, and verified before any person authorized to take oaths.

(b) the affidavit must contain:

(1) the name, address, and age of the parent whose parental rights are being relinquished;

(2) the name, age, and birthdate of the child;

(3) the names and addresses of the guardians of the person and estate of the child, if any;

(4) a statement that the affiant is or is not presently obligated by court order to make payments for the support of the child;

(5) a full description and statement of value of all property owned or possessed by the child;

(6) allegations that termination of the parent-child relationship is in the best interest of the child;

(7) one of the following, as applicable:

(A) the name and address of the other parent;

(B) a statement that the parental rights of the other parent have been terminated by death or court order; or

(d) An affidavit of relinquishment of parental rights which designates as the managing conservator of the child the State Department of Public Welfare or an agency authorized by the State Department of Public Welfare to place children for adoption is irrevocable. Any other affidavit of relinquishment is revocable unless it expressly provides that it is irrevocable for a stated period of time not to exceed 60 days after the date of its execution.

Section 15.04. *Affidavit of Status of Child*

(a) If the child is not the legitimate child of the father, an affidavit shall be executed by the mother, whether or not a minor, witnessed by two credible persons, and verified before any person authorized to take oaths.

APPENDIX G

RECORD PRESERVING FEDERAL QUESTIONS

IN THE 77TH DISTRICT COURT OF LIMESTONE COUNTY, TEXAS

THIRD AMENDED ANSWER OF BRENDA SUE STARR NOW BRENDA SUE STARR DIAZ, DAVID DIAZ AND DIXIE MARIE HENSLEY

* * * * *

IV.

Respondents would show the court that we have a situation here where 14 year old mother was forced against her will into signing an agreement which is null and void by reason of the duress and threats used against her and the insistence of her mother's attorney to sign same and that same is not legal because of the fact that the witnesses signed same prior to the time she signed same; that her mother, who is appointed as managing conservator, signed same as a witness thereby making same null and void since she was a party to said instrument and further that said agreement was not signed by David Diaz, the natural father of said child; that said parties have since married and they are now husband and wife living together at Mexia in Limestone County, Texas and that the said David Diaz at the time was unmarried and a minor and he did not give his consent to the relinquishment of the parent-child relationship nor to the adoption for which reasons said agreement is null and void and of no force and effect.

VII.

That to hold said agreement to be valid would deprive the respondents herein, Brenda Sue Starr Diaz and David Diaz, of their rights at law to their lawful child and is in violation of the due process of law clause being the Fourteenth Amendment to the Constitution of the United States and to the due law of the land clause of the Texas Constitution and said respondents are entitled to have said agreement set aside and said child delivered to them instanter.

VIII.

Respondents would show the court that the said Brenda Sue Starr Diaz and David Diaz are legally married, are living in a suitable home in Mexia, Limestone County, Texas, have the assistance of the parents of David Diaz and of the said Dixie Marie Hensley, the mother of Brenda Sue Starr Diaz, to assist them in the rearing of said child; that the said David Diaz is gainfully employed and that said parties can make a good home for their child, Terry Raye Starr Diaz.

XI.

That respondents, Brenda Sue Starr Diaz and David Diaz, are the proper persons to have the care, custody and control of said minor child, Terry Raye Starr, and that said child should be delivered over to them forthwith.

WHEREFORE, premises considered, respondents pray the court to grant the relief prayed for herein by setting aside said affidavit of severance of parental rights, grant said writ of habeas corpus and deliver said child forthwith to the said Dixie Marie Hensley, managing conservator and Brenda Sue Starr Diaz and husband, David Diaz, and for general relief and costs of court.

G-3

IN THE 77TH DISTRICT COURT
OF LIMESTONE COUNTY, TEXAS

MEMORANDUM OF AUTHORITIES
[Excerpt]

4. STANDARD OF PROOF. The Supreme Court of Texas recently ruled that the standard of proof required in termination cases is the "clear and convincing evidence" standard, which is defined as "that measure of degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established". *In the Interest of G.M.*, No. B-8515 (Civ. App. opinion at 580 S.W.2d 65).

APPELLANT'S BRIEF IN THE TEXAS COURT OF CIVIL APPEALS
[Excerpted Points]

POINT THREE

The error of the trial court in terminating the parent-child relationship and permitting the adoption of the child, Terry Raye Starr Diaz, because David Diaz remained away from Brenda Starr Diaz during her pregnancy when Brenda's step-father, Denmond Hensley, and Brenda's father, Parley Starr, threatened David's life if he ever saw Brenda again, which finding is against the great weight and preponderance of the evidence and is not supported by clear and convincing evidence and which violated his civil rights as a Mexican-American under Title 42, Section 1983 U.S.C.A. and under the Fourteenth Amendment to the United States Constitution.

TWENTY-FOURTH POINT

The error of the trial court in finding the best interests of the child will be served by remaining in the home of petitioners which is against the great weight and preponderance of the evidence and is not supported by clear and convincing evidence and contrary to the constitutional rights of the lawful and natural parents to their child.

TWENTY-SIXTH POINT

The error of the trial court in denying respondents and particularly the Mexican-American respondent, David Diaz, of a fair and impartial trial as a reading of this record will reveal relative to their constitutional rights under the Fourteenth Amendment and under the due

course of law of the land provision of Article of the Texas Constitution and under Title 42, Section 1983 U.S.C.A. which holding was against the great weight and preponderance of the evidence and was not supported by clear and convincing evidence.

TWENTY-SEVENTH POINT

The error of the trial court in denying the Mexican-American respondent, David Diaz, of his constitutional right to his natural born child which constitutional right has been guaranteed by the Fourteenth Amendment, Title 42, Section 1983 U.S.C.A. and by the Constitution of the State of Texas and which constitutional right of the respondents, Brenda Starr Diaz and David Diaz, has been guaranteed by the Supreme Court of the United States, wherein it is held that the natural parents have the first right to the child which holding was against the great weight and preponderance of the evidence and was not supported by clear and convincing evidence.

TWENTY-NINTH POINT

The error of the trial court in holding it was to the best interest of Terry Raye Starr Diaz to be reared by petitioners when the evidence as a whole and the social study of Allen Lee Darr and the record as a whole showed that Brenda and David Diaz were the natural legitimate parents of Terry and entitled to their child as a matter of law, which holding is against the great weight and preponderance of the evidence and is not supported by clear and convincing evidence.

APPELLANT'S MOTION FOR REHEARING IN TEXAS COURT OF CIVIL APPEALS

POINTS OF ERROR

I.

The error of the Court of Civil Appeals in holding that there was clear and convincing evidence that Brenda Sue Starr Diaz voluntarily abandoned the child.

II.

The error of the Court of Civil Appeals in holding that there was clear and convincing evidence that David Diaz voluntarily abandoned the child.

POINT OF ERROR VI

The error of this Court in overruling the 26th point complaining that the trial court denied appellants, particularly Mexican-American appellant, David Diaz, of a fair and impartial trial, relative to their constitutional rights under the 14th amendment and under due course of the law of the land provision Article I Section 13 of the Texas Constitution and under Title 42 Section 1983 USCA since reading of this record will show that these parties did not have a fair and impartial trial and the holding of the trial court and this Court is not supported by *clear and convincing evidence.*

POINT OF ERROR VII

The error of this Court in overruling the 27th point that the trial court erred in denying Brenda and David the natural parents of the first and prior right to their child

which holding is not supported by clear and convincing evidence and is in violation of due process of law.

POINT OF ERROR XII

This Court erred in overruling points of error 23, 24, 25 and 29 wherein the trial court terminated the parent-child relationship and granted the adoption of the child because such findings are against the great weight and preponderance of the evidence and are not supported by clear and convincing evidence.

POINT OF ERROR XIII

This Court erred in overruling points of error 1-17 inclusive, wherein the court terminated the parent-child relationship and granted the adoption of the child because such findings are against the great weight and preponderance of the evidence and are not supported by clear and convincing evidence.

APPELLANT'S APPLICATION FOR WRIT OF ERROR IN TEXAS SUPREME COURT

[Excerpted points]

POINTS OF ERROR

FIRST POINT

The Court of Civil Appeals erred in finding that there was clear and convincing evidence of the abandonment of the Diaz baby, for the reason that the Court of Civil Appeals applied an erroneous test of "preponderance of the evidence" in testing whether the evidence at trial was sufficient to support the verdict. (Civ. App. Op. p. 9) (Motion for Rehearing Points I, II, IV) (Briefed below pp. 3-5).

FOURTH POINT

The Court of Civil Appeals erred in denying Brenda and David, the natural parents of their first and prior right to their child which holding is in violation of due process of law. (Motion for Rehearing Points of Error I, II, III, IV, VI, VII, X). (Briefed below pp. 8-11).

APPELLANT'S APPLICATION FOR REHEARING ON WRIT OF ERROR IN TEXAS SUPREME COURT

[Excerpt]

Petitioners resubmit to the Court its first, second, third and fourth points of error as set out in the original and amended application for writ of error which points, statements, arguments, and authorities are embodied herein for reference as if copies herein verbatim.

* * * *

We again urge the fourth point in that the Court of Civil Appeals erred in denying Brenda and David, the natural parents, of their first and prior rights to their child which holding is violation of due process of law.

It has been held that the rights of parents to their child are of constitutional dimensions. Wiley v. Spratlin (Tex. 1976) 543 S.W.2d 349; Stanley v. Illinois, 405 U.S. 645 (1972); In the Interest of G.M. et al (Tex. 1980) 596 S.W.2d 846.

We again respectfully urge this Honorable Court that these parents have constitutional rights to their child; that the child is their legitimate child and they were deprived of their rights of due process of law and due course of the law of the land in not having the opportunity ever to rear their child. There was nothing in the record to show that they were disqualified as parents.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 19 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-547

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

DAVID DIAZ, ET UX, ET AL
Petitioners

v.

RONALD BEYER, ET UX
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WACO, TEXAS

J. PRESTON BRASHEAR, III
1580 Eastgate Drive, Suite 320
Garland, Texas 75041
(214) 270-0053
Texas Bar Card 02906000
Attorney for Respondents

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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NO. 81-547

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

DAVID DIAZ, ET UX, ET AL
Petitioners

v.

RONALD BEYER, ET UX
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WACO, TEXAS

To the Honorable Chief Justice and Associate Justices Of the Supreme Court of the United States:

Respondents, Ronald Beyer and wife, Angela Beyer, pray that writ of certiorari be denied in this case.

STATEMENT OF THE CASE

This is an at-birth private adoption case, where, in a single proceeding, the court terminated the parental rights of Brenda Starr Diaz and David Diaz, the natural parents

of the infant, Terry Raye Starr, and allowed Ronald Beyer and Angela Beyer to adopt the child. The trial court, in his judgment, recited that his findings were based upon clear and convincing evidence. The natural parents and Dixie Marie Hensley, the mother of Brenda Starr Diaz, all petitioners herein, appealed to the Court of Civil Appeals at Waco, Texas, and the Court of Civil Appeals affirmed the judgment of the trial court. Petitioners filed for rehearing in the Court of Civil Appeals, which was denied, then applied for Writ of Error to the Supreme Court of Texas and Writ of Error was refused, no reversible error. Motion for rehearing in the Texas Supreme Court was denied.

Facts:

The facts of the case are fully recited in the opinion of the Court of Civil Appeals which appears as Appendix C to Petitioners' Petition for Writ of Certiorari. The Court of Civil Appeals found the following facts were established.

Brenda Sue Starr, 14 years of age and unmarried, became pregnant in July or August of 1978, and she identified David Diaz, aged 16, as the father of her child. He admitted to such paternity. He learned of her pregnancy after the third or fourth month, but did not contribute to Brenda's support or medical care, nor did he support or see the child at any time before the trial began. At the time she became pregnant, Brenda lived with her mother and step-father. After some discord developed, she went to live with her father in Oklahoma. While there, she contacted Angela Beyer, and after some discussion, it was mutually agreed that Brenda would give up her expected

child for adoption by Ronald and Angela Beyer. The Beyers agreed in turn to see that Brenda received proper medical care and a place to live during her pregnancy. Brenda then lived in the home of Willie Mae Beyer, the mother of Ronald Beyer, and also stayed in the home of Ronald and Angela Beyer in Garland, Texas. After her mother and step-father separated, Brenda returned to live with her mother in Mexia, Texas in February of 1979, and her child was born on March 7, 1979. The Beyers paid substantially all of the doctor and hospital bills incident to the childbirth.

After the birth of the child, Brenda signed an Affidavit of Relinquishment of Parental Rights (which was stated to be irrevocable for 60 days as permitted by Texas law), an Affidavit of Status of the Child, and a written consent to allow the hospital to deliver the child to the Beyers. The Court of Civil Appeals found that no fraud, coercion or overreaching was practiced upon Brenda in connection with the signing of those papers. The Beyers took the child from the hospital on March 10, 1979 when he was three days old, and he has lived with them continuously since that time. The child is now two and one-half years old.

A few days after she got out of the hospital, Brenda and David were married. The adoptive parents then filed this suit for termination and adoption on March 19, 1979 in Dallas County, where they reside. The Dallas court issued a restraining order to protect the Beyers and the child, and Brenda and David were both served with citation, the restraining order and a notice to appear before the court for a temporary hearing. They did not appear for the temporary hearing, and the court con-

tinued the restraining order as a temporary injunction, and appointed the Beyers as Temporary Managing Conservators of the child.

The temporary restraining order and the temporary injunction merely ordered the petitioners to refrain from molesting or disturbing the child or the adoptive parents, from interfering with their possession of the child, and from removing the child from the jurisdiction of the Court. Those orders did not prohibit visitation with the child or sending money for support of the child, or inquiring about the child's welfare.

After Brenda and David answered this suit, they were successful in getting the case transferred to Limestone County, Texas, where they lived in the town of Mexia. The case was then tried before the court without a jury, after which the court terminated the parental rights of the natural parents and granted the petition for adoption. In the trial, the natural parents were allowed to fully develop their case, they were ably represented by counsel, and they testified fully concerning their claimed defenses. Two caseworkers for the Texas Department of Human Resources testified fully as to their respective investigations of the homes of the Beyers and of the Diazes, and both testified that it would be traumatic to this child to be separated from the Beyers. The testimony of the Beyers and their witnesses established that a loving family relationship existed between the Beyers and Terry Raye Starr. Evidence was fully developed at the trial concerning the character, experience, maturity, parenting abilities and financial and other resources of the Beyers and the Diazes. It is undisputed that David and Brenda Diaz do not know this child at all, have no relationship with him, and would

be strangers to him. They never attempted to visit with the child, never inquired about the welfare of the child, and never contributed to his support prior to commencement of the trial. Then after the start of the trial, when the child was almost one year of age, they tendered $100.00 into the registry of the court, which is the only sum they ever contributed for the support of their child. The trial court signed a decree terminating the parental rights of the natural parents and granting the Beyer's petition for adoption, which decree recites that his findings were based upon clear and convincing evidence. The petitioners did not request that the trial court file findings of fact or conclusions of law.

The Court of Civil Appeals at Waco, Texas, held that in reviewing the entire record and applying the clear and convincing standard of proof, they found that the evidence justified the trial court in terminating the parental rights of David and Brenda Diaz and granting the adoption of the child by Ronald and Angela Beyer. The appeals court expressly found that David Diaz, voluntarily and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth. The court further found that Brenda Diaz voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return. The court found that the termination of parental rights was in the best interest of the child.

Brenda and David are now divorced, Brenda having filed a petition for divorce in the same court which heard this termination case, in which she alleged that no children were born of the marriage, and in which she did not ask for custody of this child. David filed a waiver of citation, not mentioning any child of the marriage. A decree of divorce was signed on May 12, 1981, in which the court found there were no children. (See Appendix A to this brief for the Petition, Waiver and Decree.)

Federal Questions Not Properly Raised:

Petitioners claim that they have properly raised the following federal questions: (1) whether a state statute can constitutionally authorize termination of parental rights without a showing of unfitness of the natural parents or detriment to the child and (2) whether a different standard of review must be used in a clear and convincing evidence case. These questions, however, were not properly raised in the courts below.

In the trial court, in their Third Amended Answer, Petitioners, referring to the Affidavit of Relinquishment signed by Brenda Starr, allege that to hold such instrument to be valid, as against the contention that it was obtained by duress, would violate the due process clause of the 14th Amendment.

Before the Texas Court of Civil Appeals, the Petitioners raised numerous points, which are set out in Appendix G to their petition. In their Point 3, David merely complains that the evidence is insufficient under a clear and convincing evidence standard and he makes reference to Title 42, Section 1983 U.S.C.A. and then makes general reference to the 14th Amendment of the

United States Constitution. In their 24th Point, they complain again of the sufficiency of the evidence under a clear and convincing evidence standard and speak in general of a finding being contrary to their constitutional rights, without specifying whether they are talking about the Texas Constitution or the Constitution of the United States. In their 26th Point, Petitioners speak of a denial of a fair and impartial trial, as relates to the 14th Amendment, and the Texas Constitution and Title 42, Section 1983, U.S.C.A. In their 27th Point, Petitioners complain of the trial court denying to them their constitutional rights to their natural child, as guaranteed by the 14th Amendment, Title 42, Section 1983, U.S.C.A., the Constitution of the State of Texas and the Supreme Court of the United States. In their 29th Point, Petitioners complain that they were entitled to their child as a matter of law, and the holding of the trial court is not supported by clear and convincing evidence.

In none of the foregoing points do the Petitioners complain that the Texas Statutes are constitutionally infirm for allowing termination without a showing of unfitness or detriment to the child, nor do they complain to the court that the 14th Amendment to the U. S. Constitution requires a different standard of review in a clear and convincing evidence case.

In their Motion for Rehearing in the Texas Court of Civil Appeals, the Petitioners simply complain that the Court of Civil Appeals was in error in holding that there was clear and convincing evidence that David Diaz or Brenda Sue Starr Diaz voluntarily abandoned the child, that they did not have a fair and impartial trial, that the trial court denied Brenda and David Diaz their rights to their child, which holding is not supported by clear

and convincing evidence and is in violation of due process of law, without specifying whether the due process claim arises under the U. S. Constitution or the Constitution of the State of Texas, and generally that the findings of the court are not supported by clear and convincing evidence.

In their Application for Writ of Error in the Texas Supreme Court, Petitioners complain for the first time that the Court of Civil Appeals applied an erroneous test of "preponderance of the evidence" in ruling on the sufficiency of the evidence, and they also complain that the Court of Civil Appeals denied the natural parents their rights to their child in violation of due process of law, again without stating whether the due process claim arises under the Federal constitution or the State constitution.

In their Application for Rehearing on Writ of Error in the Texas Supreme Court, Petitioners incorporated their points of error from their Application for Writ of Error, and advised the Texas Supreme Court that the rights of parents to their child are of constitutional dimensions.

REASONS FOR DENYING CERTIORARI

Summary of Argument

At the several stages of the proceedings in the state courts, the petitioners have asserted various claims that their constitutional rights have not been properly respected, but the claims have varied greatly at various stages in the proceedings, and have been only vaguely stated, and the claimed federal questions asserted below are not the same as the two questions finally presented

in the petition for certiorari. The only claim raised below that might remotely be considered to be included in the claims presented here is the claim that the Texas Court of Civil Appeals applied an erroneous test in determining whether the evidence at trial was sufficient to support the verdict, and that claim was made for the first time in the Texas Supreme Court, and was therefore not timely presented under state law. The claimed federal questions were therefore not properly presented in the state proceedings.

The Texas Court of Civil Appeals set out in its opinion the facts which it found to be established by clear and convincing evidence. This Court should defer to those findings of fact. The court found that David Diaz abandoned the mother of the child during the pregnancy and failed to support the child after the birth. The court found that Brenda Diaz voluntarily left her child in the possession of another and expressed an intent not to return. Those findings satisfied the requirements of the Texas Family Code as statutory grounds for termination of parental rights. In addition, as required by the Family Code, the court found that the termination was in the best interest of the child. This statutory scheme does not violate the substantive due process rights of natural parents who have never established any actual family relationship with their natural child, and have never supported their child. The court may constitutionally give recognition to an existing family unit by terminating the parental rights of the natural parents and granting adoption by adoptive parents who have had the child since he was three days old, without any need for showing that the natural parents are unfit or that it would be detrimental to the child to continue their parental rights.

No new standard for appellate review is needed in a termination case where the trial court and appeals courts applied a clear and convincing standard of proof. This Court has never held that a clear and convincing standard is constitutionally required in a termination case, and it would be premature and inappropriate to so hold in this case. Only after deciding whether a clear and convincing standard should apply to a termination case, should the Court then address the question whether any new standard for appellate review should be enunciated, and what that standard should be. The Texas courts properly applied the clear and convincing evidence standard in this case, and Petitioners' proposed new standard would not have affected the outcome of the case.

Fact Determinations Not Properly Reviewable

The Texas Courts, applying the clear and convincing evidence standard, found that both Brenda Starr Diaz and David Diaz had committed acts or omissions which are defined in the Texas Family Code as grounds for termination of parental rights. In a full trial, at which the Petitioners were represented by able counsel, and wherein they were allowed to fully develop all testimony relevant to any issues in the case, the trial court determined that the statutory grounds for termination had been proved, and that in addition thereto, the child's best interest required termination of the parental rights of the Diaz couple and the granting of the petition for adoption by the Beyers. The relevant facts are set out by the Texas Court of Civil Appeals in its opinion (see Appendix C of the Petition for Writ of Certiorari). From the operative facts as set out, the Court of Civil Appeals found the ultimate facts necessary for a termination of

parental rights; i.e., (1) on the part of David Diaz an abandonment of the mother during the pregnancy followed by nonsupport of the child after birth and (2) on the part of Brenda Starr Diaz, that she left the child in the possession of another and expressed an intention not to return, and (3) that termination is in the best interest of the child. It is well settled doctrine that the decision of a state court upon a question of fact will not ordinarily be made the subject of inquiry by the Supreme Court. *Fry Roofing Company v. Wood,* 344 U.S. 157, 73 S.Ct. 204, 97 L.Ed. 168 (1952). The trial court, as fact finder, determined to disbelieve Brenda Diaz' contentions that she was coerced into signing the relinquishment, and to disbelieve the story of David Diaz that his abandonment of the mother was only because of claimed threats against his life.

The court as fact finder was best able to evaluate the credibility of the witnesses, to observe their demeanor in court, and to assess their possible motives or bias; the court in this case evidently determined that David Diaz was not in fact threatened or that the alleged threats were not seriously made or that David was not intimidated by them. In any event, the Court of Civil Appeals noted that the claimed threats were to the effect that David should leave Brenda alone, but not that he should not contribute toward Brenda's or the child's support. It would be inappropriate for this Honorable Court to review those factual determinations.

Petitioners complain of the failure of the judgment to contain specific findings of fact. Texas law places on Petitioners the burden of requesting that the court file findings of fact and conclusions of law. Petitioners did

not request findings of fact, and in the absence of such findings, Texas law provides that the reviewing court must presume that every disputed fact issue was found by the trial court in support of the judgment rendered. *Seaman v. Seaman,* 425 S.W.2d 339 (Tex. 1968); *In the Interest of Brenda Jo Stuart, a Minor,* 544 S.W.2d 821 (Tex. Civ. App.—Tyler 1976, writ refused, no reversible error).

Federal Questions Not Properly Presented

This court should also refuse to issue a writ of certiorari for the reason that the Federal questions now presented by the Petitioners were not properly raised in the state courts below. In their pleadings in the trial court, the Petitioners' only assertion of any Federal question was that it would violate the due process of law clause of the 14th Amendment to the Constitution of the United States if the trial court were to hold that the Affidavit of Relinquishment signed by Brenda was valid, as against her contention that it was obtained by duress and threats and was not properly executed. That Affidavit was only signed by Brenda Starr and a holding as to its validity would only affect her rights. David Diaz therefore presented no constitutional claims whatever in the trial court, and the claims which Brenda Starr Diaz presented in the trial court are, of course, not the questions she now raises in this court.

At no point in the trial court or the Court of Civil Appeals or the Texas Supreme Court did the Petitioners ever claim that the Texas Statute was unconstitutional, or that it was unconstitutional as applied to them, for allowing termination of parental rights of a natural parent

without a showing of parental unfitness or detriment to the child, as they now claim.

It was only in their Application for Writ of Error in the Texas Supreme Court that the Petitioners first raised any question about an erroneous standard of review in a clear and convincing evidence case. Even then, they did not advise the court what standard of review they claimed to be appropriate to protect their constitutional rights. The Supreme Court should properly consider only the specific Federal questions which were properly raised in the state court. *New York ex rel Cohn v. Graves,* 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666 (1937), *Flournoy v. Wiener,* 321 U.S. 253, 64 S.Ct. 548, 88 L.Ed. 708 (1944). Petitioners did not, in the state courts, present their Federal questions with particularity and definiteness or with fair precision, so it is not possible in each stage of the state proceedings to know just what provision of the Federal Constitution the Petitioners relied upon, or exactly what rights they claimed thereunder, and therefore this court should deny certiorari. *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572; *Bryant v. Zimmerman,* 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184 (1928).

Under Texas law, Petitioners were required to state in their Motion for Rehearing before the Texas Court of Civil Appeals any grounds which they might have for a reversal of the decision of that court, or be deemed to have waived such grounds for reversal. Rule 469(e), Texas Rules of Civil Procedure, provides in part, "Whether the matter complained of originated in the trial court or in the Court of Civil Appeals, it must be assigned as error in the motion for rehearing filed in

the latter court." By failing to claim in their Motion for Rehearing in the Court of Civil Appeals that the Court of Civil Appeals used an erroneous standard for review, the Petitioners have waived any such claim for failure to properly and timely present the claim in the state courts. *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486; *CIO v. McAdory*, 325 U.S. 472, 65 S.Ct. 1395, 89 L.Ed. 1741 (1945).

In the alternative, should it be determined that Petitioners have in fact properly raised federal questions, it should be held that such questions are not substantial when raised by a mother who voluntarily gave up her infant for adoption and a father who knowingly abandoned the mother during pregnancy and who has not supported the child.

As to Dixie Hensley it should be noted that at no time in the state courts or in the Petition for Certiorari has she raised any federal question whatever.

Texas Termination Statutes Are Constitutional

The Texas statutory arrangement for termination of parental rights is set out in Section 15.02 of the Texas Family Code, the relevant portions of which appear as Appendix F to the Petition for Writ of Certiorari. The Family Code provides a two step approach to termination of parental rights. First, the fact finder is required to determine whether one of the enumerated factual grounds for termination exists or has occurred. If the fact finder so finds, then the court must determine whether termination is in the best interest of the child. The relevant factual ground for termination of the rights of the mother as provided in the Family Code is that she has "voluntarily

left the child alone or in the possession of another not the parent and expressed an intent not to return." The Code provision applicable to the father is that he "voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth."

The Supreme Court of Texas held in *In the Interest of G. M.*, 596 S.W.2d 846 (Tex. 1980), that the degree of proof required for termination of parental rights is clear and convincing evidence. Any excuse or extenuating circumstances related to any statutory grounds for termination may be presented by the natural parent and will be considered by the fact finder in connection with the determination of best interests of the child. See *Holley v. Adams,* 544 S.W.2d 367 (Tex. 1976).

This Honorable Court has, in the past, emphasized the constitutional dimensions of parents' rights to their natural children. *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). The court, however, has never held such rights to be absolute.

In *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), this Honorable Court held that a natural father's substantive due process rights were not violated by application of the "best interests of the child" standard in permitting adoption by the stepfather, where the natural father had never shouldered any significant responsibility for the child. The court noted that due process would be violated if the state were to break up

a natural family without some showing of unfitness, but noted that the effect of the adoption in *Quilloin* was to give full recognition to a family unit already in existence.

In *Abdiel Caban v. Kazim Mohammed*, 99 S.Ct. 1760, this court stated at page 1768 "in those cases where the father has never come forward to participate in the rearing of his child, nothing in the equal protection clause precludes the state from withholding from him the privilege of vetoing the adoption of that child." Nothing was said there about any need to show that such a father was unfit.

The cases on which Petitioners place such great reliance as requiring that the natural parents be shown to be unfit are invariably those cases wherein the natural parents have in fact some established existing relationship with the child, and where the severance of that relationship would be traumatic to the child, or where state law requires that parental unfitness be shown. In cases where the biological parents have no existing relationship with the child, and where there is no existing family unit which would be broken up, it has been recognized that the existing family relationship is the one between the adoptive parents and the child, and the adoptive parents have become the "psychological parents" to the child. See *Quilloin v. Walcott*, supra. In *Rothstein v. Lutheran Social Service of Wisconsin and Upper Michigan*, 405 U.S. 51 (1972), which involved a natural father's request to upset a perfected adoption order, this court vacated a state court order in that case and remanded in the light of *Stanley v. Illinois*, supra, but then instructed the state courts to consider "the fact that the child has apparently lived with the adoptive family for the intervening period

of time," thereby recognizing the child's need for stability as being constitutionally important.

Petitioners are asking this Court to hold that the parental rights of natural parents can never be terminated, regardless of circumstances, unless they are then unfit or a detriment to the child is shown. Thus they would have all non-final adoptive placements, whether private or through licensed agencies, be terminable at the whim of either natural parent, regardless of prior abandonment or voluntary relinquishment, so long as the natural parent is not then unfit. They would have the Court hold that they have absolute property rights to their natural progeny which outweigh the child's right to stability and a continuation of the loving family connections he has formed with his adoptive parents, even where the natural parents are total strangers to the child.

In the case now before this Court, the Petitioners were allowed to fully develop their case, to present all the witnesses they desired, to explain their situation and all matters which they felt excused or mitigated their actions, such as claimed threats, duress and coercion. The Court of Civil Appeals held that by agreeing that she was giving up her baby for adoption and by signing the necessary papers, Brenda Starr voluntarily left the child in the possession of another not the parent and expressed an intent not to return. The Court found authority for such a holding in *Myers v. Patton*, 543 S.W.2d 22 (Tex. Civ. App.—Texarkana 1976, no writ history). Except for the assertion that she felt that she had been coerced to sign the relinquishment, the facts in this regard are without dispute, inasmuch as there was an admitted agreement that Brenda was giving up her baby for adoption by the

Beyers, and pursuant to that agreement Brenda signed all the requested documents.

As to the actions of David Diaz, the record shows without contradiction that he knew of Brenda's pregnancy and that he did not provide any support or medical attention for her during her pregnancy, nor did he provide any support for the child for more than 11 months after the birth, nor did he attempt to visit with the child or make any inquiry about the child's welfare. In *Stanley v. Illinois*, supra, this Court said, "we do not question the assertion that neglectful parents may be separated from their children." At the time when Brenda agreed to allow the adoption and when she signed the relinquishment and when the Beyers took this child and started to love him and raise him as their own, David Diaz had not come forward to participate in the raising of this child or to assume any responsibility whatever toward him. The language previously quoted from *Caban v. Mohammed*, supra, would strongly suggest that David's rights to object to this adoption were forfeited. By his knowing avoidance of his responsibility during the mother's pregnancy, he placed her in the desperate position of having to determine alone what arrangements would best serve the interests of her expected baby. Having placed her in that position, he may properly be held to have forfeited any right he might otherwise have had to complain about the placement decisions that were made. The unwed mother, faced with the dilemma that Brenda Starr faced, needs all the available options which the law can make available to her, including the option of determining that this child would be best protected by permitting his adoption by qualified adoptive parents. The option of such adoptive placement would be effectively denied to

her if the law did not provide some assurance to the adoptive parents that the placement would have some permanence, subject only to the court's determination that it is in the best interest of the child. To this extent, the state has a compelling interest in seeing that children born out of wedlock, and presumably those most likely to be dependent upon the state for protection, will have the greatest protection which the law can provide to them.

As to the need for showing unfitness of the natural father, the Texas Statute defines a form of parental unfitness, in the sense that it is a legislative determination that a father who has knowingly abandoned the mother of his child has shown that he is unfit as a parent by reason of his demonstrated lack of willingess to assume financial and protective responsibility for the child. While the Texas statutory provisions applicable to the mother might not be said to determine that she is unfit, it would seem that she has waived any right to insist that she be shown to be unfit as a parent. At least it may be said that the state has a superior interest in protecting the welfare of the child, once the mother has turned over the child to another and has executed a sworn relinquishment of her rights. The rights of the child himself should be considered to be paramount in such a circumstance, inasmuch as the child has a right to not be kept in some kind of limbo, forever subject to the possibility that the mother might change her mind and again claim a right to possession of the child. In the absence of fraud, coercion or overreaching in procuring the voluntary relinquishment, the mother who changes her mind should at least have to meet the burden of defending against the claim that it is in the best interest of the child to terminate her parental rights.

No new standard of appellate review is shown to be needed

Petitioners have requested that this Honorable Court hold that "clear and convincing evidence" is the proper standard of proof in a termination case. This Court has recently turned down an opportunity to so hold. See *Doe v. Delaware*, Memorandum Decision, 101 S.Ct. 1495 (1981). Even if a clear and convincing standard is constitutionally required in a termination case, it would seem that the present case is not an appropriate one for such a decision to be made. The clear and convincing standard was applied in this case, inasmuch as it has been adopted by the Supreme Court of Texas for termination cases. *In the Interest of G. M.*, 596 S.W.2d 846 (Tex. 1980). The Court of Civil Appeals found that the adoptive parents had met the burden of such a standard. The adoptive parents are not here complaining of that burden, and it would therefore seem that this case is an inappropriate one for the enunciation of such a constitutional standard, since it is unnecessary to a decision in this case, and since both sides of that issue would not likely be fully researched, developed, presented and argued by the litigants in this case. It is respectfully suggested that this court should await a case which clearly presents the need for the enunciation of such a standard as being necessary to a decision of the case, where the sides are adversely aligned as to such issue and presumably would be far better motivated to fully develop and present all aspects of that question.

Inasmuch as this court has not held that a clear and convincing evidence standard applies to a termination case, it would be inappropriate for this court to promulgate a standard for appellate review of a clear and con-

vincing evidence standard as applied to a termination case. Petitioners cite *Jackson v. Virginia,* 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781, as authority for their suggestion that this court should define a standard of review for clear and convincing evidence cases. *Jackson,* of course, was a criminal case, requiring proof beyond a reasonable doubt, and did not purport to establish a standard of appellate review for clear and convincing evidence cases. Petitioners complain that the Texas court "ignored" the precedent of *Jackson,* but they never cited that case to the Texas Courts. Petitioners then cite three state court cases illustrating the standard of review for termination cases in Arizona, Illinois and Minnesota, and from that limited sampling, conclude that chaos exists because of the lack of a Supreme Court mandated standard of review of such cases. Respondents respectfully suggest that no such state of chaos is shown to exist and would point out that the Petitioners have not shown that the various standards enunciated in the cited cases have resulted in any erroneous decisions or that the proposed standard of review would have made any difference in those cases.

In our present case, the Petitioners have not shown how the adoption of their proposed standard of review would have made the slightest difference in the outcome of this case. Inasmuch as David Diaz' abandonment of Brenda during her pregnancy, and his subsequent non-support of the child are clearly shown, and inasmuch as Brenda's execution of the Affidavit of Relinquishment and her agreement to allow the Beyers to adopt her baby have been clearly shown without dispute, it is difficult to see how the outcome of this case would be any different even if the standard proposed by the Petitioners were adopted.

Petitioners have contended that the Texas Court of Civil Appeals limited its review of this case to a determination of whether the findings of the trial court are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, which they claim is a standard of review normally applied to preponderance of the evidence. It would appear that the Petitioners have not carefully read the appellate court opinion however. The court discussed the evidence at length, noting that the facts had been fully developed, and set out at length the facts which they determined to have been proved, and stated "it is our view of the case that the evidence is clear and convincing that Brenda 'voluntarily left the child—in the possession of another not the parent and expressed an intent not to return' as provided by subdivision (1)(A) of Article 15.02, and that David 'voluntarily and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child,—and failed to support the child since the birth,' under the provisions of subdivision (1)(H) of Article 15.02." Thus having determined that statutory grounds for termination had been proved by clear and convincing evidence, the court went on to discuss the circumstances, maturity, abilities, education, parenting skills and financial resources of both the natural parents and the adoptive parents, and the actual existing "parent-child" relationship already established between Terry Rae Starr and the Beyers, as all of such factors related to "the best interest of the child." The Court of Civil Appeals then stated "In viewing the

entire record in this case and applying the clear and convincing standard of proof, we believe that such evidence justified the trial court in terminating the parental rights of David and Brenda Diaz and granting the adoption of the child by Ronald and Angela Beyer." The Court went on to say, "Moreover, we cannot say that said findings of the trial court are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust . . ." It is that last statement, standing alone, which Petitioners claim shows that the court applied an improper standard for review for a clear and convincing evidence case. It seems clear from the court's use of the word "moreover" at the beginning of such statement, that that statement is given as an additional reason for affirming the trial court's judgment and not as the sole reason for so doing.

A fair reading of the full opinion of the Court of Civil Appeals shows that the Court understood and properly applied the clear and convincing standard in reviewing the actions of the trial court.

CONCLUSION

Respondents respectfully pray that this Honorable Court deny the Petition for Certiorari filed herein by Petitioners.

Respectfully submitted,

J. PRESTON BRASHEAR, III
Attorney for Respondents
1580 Eastgate Drive, Suite 320
Garland, Texas 75041
(214) 270-0053
Texas Bar Card 02906000

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, filed on behalf of Respondents Ronald Beyer and Angela Beyer, were duly served upon Petitioners David Diaz, Brenda Starr Diaz and Dixie Marie Hensley, by placing same in the United States Mail, first class postage prepaid, certified return receipt requested, addressed to Mr. L. L. Geren, P. O. Box 306, Groesbeck, Texas 76642, attorney for Petitioners, and by placing three (3) copies of said Brief in the United States Mail, first class postage prepaid, certified return receipt requested, addressed to Mr. Dale Hamilton, 202 East Milam, Mexia, Texas 76667, Guardian ad litem for the infant, Terry Raye Starr Beyer, on this the _____ day of October, 1981.

J. PRESTON BRASHEAR, III
Attorney for Respondents

Appendix

APPENDIX A

CAUSE NO. 19,082-A

IN THE 77TH DISTRICT COURT OF
LIMESTONE COUNTY, TEXAS

IN THE MATTER OF THE MARRIAGE OF
BRENDA SUE DIAZ AND
DAVID DIAZ

ORIGINAL PETITION

This suit is brought by Brenda Sue Diaz, Petitioner, who is 16 years of age and who resides at 321 S. 10th, Teague, Texas.

David Diaz, Respondent, is 18 years of age and resides at 308 W. Houston, Mexia, Texas.

I.

Petitioner has been a domiciliary of this state for the preceding six-month period and a resident of this county for the preceding 90-day period.

II.

Process should be served on Respondent at 308 W. Houston, Mexia, Texas.

III.

The parties were married on or about March 18, 1979, and ceased to live together as husband and wife on or about February 25, 1981.

The marriage has become insupportable because of discord or conflict of personalities between Petitioner and Respondent that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.

IV.

There is no child born or adopted of this marriage, and none is expected.

V.

Petitioner requests the Court to divide the estate of the parties by awarding their property to the party having possession.

VI.

Petitioner requests a change of name to Brenda Sue Starr.

PRAYER

Petitioner prays that citation and notice issue as required by law and that the Court grant a divorce and decree such other relief requested in this petition.

Petitioner prays that Petitioner's name be changed as requested above.

Petitioner prays for general relief.

/s/ RICKY SIMS
Ricky Sims, Attorney for Petitioner
1010 E. Loop 255,
P. O. Drawer 295
Teague, Texas 75860
817/739-2563
#18426700

A-3

CAUSE NO. 19,082-A

IN THE 77TH DISTRICT COURT OF
LIMESTONE COUNTY, TEXAS

IN THE MATTER OF THE MARRIAGE OF
BRENDA SUE DIAZ AND
DAVID DIAZ

WAIVER OF CITATION

THE STATE OF TEXAS §
COUNTY OF FREESTONE §

BEFORE ME, the undersigned authority, on this day personally appeared David Diaz, who, being by me duly sworn, upon oath stated:

"I, David Diaz, am the Respondent in the above-entitled and -numbered cause. My mailing address is 308 W. Houston, Mexia, Texas. I have been given a copy of the Original Petition that has been filed in this cause, and I have read it and understand it. I hereby enter my appearance in this cause for all purposes and waive the issuance and service of process. I agree that the petition may be amended and that the cause may be taken up and considered by the Court without further notice to me, including notice of entry of final judgment. I further waive the making of a record of testimony in this cause."

/s/ DAVID DIAZ
David Diaz, Respondent

SUBSCRIBED AND SWORN TO before me this 24th day of March, 1981.

/s/ IRA C. HORN
Notary Public in and for the
State of Texas
Limestone County

My commission expires:
10-31-84

I, the notary public whose signature appears above, certify that I am not an attorney in this case.

/s/ IRA C. HORN

CAUSE NO. 19,082-A

IN THE 77TH DISTRICT COURT OF
LIMESTONE COUNTY, TEXAS

IN THE MATTER OF THE MARRIAGE OF
BRENDA SUE DIAZ AND
DAVID DIAZ

DECREE OF DIVORCE

On the 12th day of May, 1981, the Petitioner, Brenda Sue Diaz, appeared in person and by attorney and announced ready for trial.

The Respondent waived issuance and service of citation by waiver duly filed and did not otherwise appear.

The Court, having examined the pleadings and heard the evidence and argument of counsel, finds that all necessary residence qualifications and prerequisites of law have been legally satisfied, that this Court has jurisdiction of all the parties and subject matter of this cause, and that the material allegations contained in Petitioner's pleadings are true. A jury was waived, and all matters in controversy, including questions of fact and of law, were submitted to the Court. All persons entitled to citation were properly cited.

The making of a record of testimony was waived by the parties with the consent of the Court.

IT IS DECREED that Brenda Sue Diaz, Petitioner, and David Diaz, Respondent, be and they are hereby divorced.

The Court finds that there is no child of the marriage of Petitioner and Respondent and that none is expected.

The Court finds that no community property other than personal effects has been accumulated by the parties.

IT IS DECREED that the property of the parties be and is hereby awarded to the party having possession of such property.

IT IS DECREED that Petitioner's name be and is hereby changed to Brenda Sue Starr.

IT IS DECREED that Petitioner and Respondent shall execute all instruments necessary to effect this decree and that Petitioner and Respondent have all appropriate and necessary writs, execution, and process, as many and as often as is necessary to accomplish the execution and final disposition of this judgment.

All costs of court expended in this cause are adjudged against the party by whom incurred, for which let execution issue.

IT IS DECREED that all relief requested in this cause and not expressly granted herein be and is hereby denied.

SIGNED this 12th day of May, 1981.

/s/ TATE McCAIN
Judge Presiding

Petitioner's Reply Brief

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NO. 81-547

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

DAVID DIAZ, ET UX, ET AL
Petitioners

v.

RONALD BEYER, ET UX
Respondents

MOTION TO STRIKE PORTIONS OF RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WACO, TEXAS

L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642-0306
(817) 729-3211
Bar Card No. 07816000
Attorney for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

NO. 81-547

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Brenda Starr Diaz, David Diaz, and Dixie Marie Hensley respectfully move this Court to strike the first paragraph of page 6 and Appendix A in its entirety (Pages A-1 through A-5) of Respondents' Brief in Opposition to Writ of Certiorari.

For authority Petitioners rely upon Rule 34.6 of the Rules of the United States Supreme Court effective June 30, 1980: "Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, *irrelevant, immaterial, and scandalous matter.* Briefs not complying with this paragraph may be disregarded and stricken by the Court."

Those portions of Respondents' Brief in Opposition cited contain matter that is irrelevant, immaterial and scandalous. Reference is made to matters wholly outside the record of this case and which do not affect the important and substantial federal rights of the Petitioners at issue before this Court. Respondents' proffered exhibits reflect collateral events that occurred on May 12, 1981 almost one year after the trial court's decision and subsequent to the decision of the Texas Court of Civil Appeals on January 30, 1981 from which review is sought. This matter is offered solely to influence and prejudice this Honorable Court and such material outside of the record of the case should be rejected. See *Russell v. Southard,* 53 U.S. (12 How.) 139, 158-159 (1851) ("This Court must affirm or reverse upon the case as it appears in the record.")

Rule 22 of the United States Supreme Court Rules requires Briefs in Opposition to Petition for Writ of Certiorari to comply with the requirements of Rule 34. Briefs such as that submitted by Respondent that do not comply should be stricken. *Huffman v. Pursue, Ltd.,* 419 U.S. 892 (1974).

Wherefore, premises considered Petitioners respectfully pray that their motion to strike be granted or in the alternative that Respondents' Brief in Opposition be disregarded; and Writ of Certiorari be granted.

Respectfully submitted,

L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642-0306
(817) 729-3211
Bar Card No. 07816000

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Reply Brief to Respondents' Brief in Opposition to Petition of Writ of Certiorari filed on behalf of Petitioners David Diaz, Brenda Starr Diaz and Dixie Marie Hensley were duly served upon Respondents Ronald Beyer and Angela Beyer by placing same in the United States mail first class postage prepaid, certified return receipt requested, addressed to Mr. J. Preston Brashear, III, 1580 Eastgate, Suite 320, Garland, Texas 75041 and to Mr. Joe Cannon, Cannon Building, Groesbeck, Texas 76642, attorneys for Respondents and by placing three (3) copies of said petition in the United States mail first class postage prepaid, certified return receipt requested addressed to Mr. Dale Hamilton, 202 East Milam, Mexia, Texas 76667, Guardian ad litem for the infant, Terry Raye Starr Diaz (Beyer) on this the _____ day of October, 1981.

L. L. GEREN

Attorney for Petitioners
David and Brenda Diaz and
Dixie Marie Hensley

Petitioner's Reply Brief 2

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WACO, TEXAS

PETITIONERS' REPLY MEMORANDUM

L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642-0306
(817) 729-3211
Bar Card No. 07816000
Attorney for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WACO, TEXAS

PETITIONERS' REPLY MEMORANDUM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Federal Question Was Properly Presented

Respondents' arguments that Petitioners have not properly presented their federal claim is not persuasive. Throughout this case Petitioners have clearly relied, either

expressly or impliedly on the due process clause of the Fourteenth Amendment of the United States Constitution. No particular form of words is necessary to be used in order that the federal question may be said to be involved, as long as something in the case before the state court which would call its attention to the federal question as one that was relied upon. *Dewey v. Des Moines,* 173 U.S. 193 (1899).

Petitioners have repeatedly relied upon "due process", "the due process of law clause being the Fourteenth Amendment to the Constitution of the United States", "Fourteenth Amendment", and both U.S. Supreme Court and Texas Court cases that construe the rights of parents as being of federal constitutional dimensions.

There can be no ambiguity that when Petitioners placed reliance on "due process" reference was to the federal constitution. The Texas Constitution does not have a "due process clause" but rather Article I Section 19 of Texas Constitution has a "due course of the law of the land clause." This distinction is known in Texas practice and is evident from Petitioners' point of error that invoke both due process and due course of the law of the land. (See Petition for Certiorari pp. G-4 through G-8). With the requisite particularity and definiteness, Petitioners undoubtedly informed the state courts that their claim was based on federal constitutional grounds.

Respondents have argued that Petitioners have not properly presented under state procedural grounds their federal question. (Brief in Opposition, pages 13-14). Respondents pointedly fail to cite any Texas case authority for support that Petitioners motion for rehearing points of error (Petition for Certiorari p. G-6, 7) were

insufficient to preserve under Texas law what is basically the same error charged in the Texas Supreme Court and before this court: insufficiency of the evidence. Texas Rule of Civil Procedure, Rule 469(e) cited by Respondent requires raising the matter assigned as error in the motion for rehearing before the Court of Civil Appeals. This Rule must be considered as interpreted by the objectives of the Rules and as construed by the Texas Courts. Rule 1 of the Texas Rules of Civil Procedure in part provides that "[T]he proper objective of rules of civil procedure is to obtain a just a just, fair, equitable and impartial adjudication of the rights of litigants under established principals of substantive law . . .". "[T]o the end that this objective maybe attained . . . these rules shall be given a liberal construction." Indeed the requirement of Rule 469(e) have been liberally construed. A point is sufficient if it directs the Court's attention to the matter complained of and the court will look not only to the words in the point but also the statement and argument thereunder to determine the question. *Fambrough v. Wagley,* 140 Tex. 577, 169 S.W.2d 478 (1943).

Throughout the Brief for Motion for Rehearing, Petitioners cite the Texas case of *In the Interest of G.M.,* 596 S.W.2d 846 (Tex. 1980) that establishes the clear and convincing burden of proof for termination of parental rights based on the due process clause of the Fourteenth Amendment to the U.S. Constitution and reiterates the nature of parent right as being of federal constitutional dimensions.

Respondents' argument that Petitioners failure to request a statement of findings of fact and conclusion of

law at the trial court should be determinative is also without force. Under Texas law it has specifically been held such decision may be reviewed on the record for insufficiency of the evidence. *Miller v. Puritan Fashions Corp.*, 516 S.W.2d 234 (Tex. Civ. App.—Waco 1974 writ ref'd n.r.e.).

Petitioners further assert that the question of proper presentation of federal claim in state courts is itself a matter of federal law. *Davis v. Wechglen*, 263 U.S. 22 (1923). *Angel v. Bullington*, 330 U.S. 183 (1947). Respondents in their Brief in Opposition misplace reliance in *Street v. New York*, 394 U.S. 576 (1969) and *Bryant v. Zimmerman*, 278 U.S. 63 (1928) for argument that in this record Petitioners have not properly presented their federal questions in each stage of the state court proceeding. These cases establish that the federal question will be held to have been properly presented when presented either expressly or with clear intendment of their federal right relied upon.

In Petitioner's presentation of the federal right they have relied upon as presented in their Petition for Certiorari Appendix B, is more fully developed in their supporting briefs and arguments at each stage of the state court proceedings and have met these requirements at least as well as that approved by this Court in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

That Petitioners' case involves a request for this Honorable Court to review a state court's finding of facts is not controlled by *Fry Roofing Company v. Wood*, 344 U.S. 157 (1952) as urged by Respondents. Rather it clearly falls within the rule of *United Gas Public Service*

v. Texas, 303 U.S. 123 (1938), where this Court held it would review findings of fact by state courts where:

1) a federal right has been denied as a result of a finding shown by the record to be without evidence to support it and

2) where conclusions of law as to a federal right and finding of fact are so intermingled as to make it necessary in order to pass upon federal question to analyse facts.

CONCLUSION

For the reasons stated in their Petition for Certiorari and in this reply, Petitioners respectfully pray that the Writ of Certiorari be granted.

Respectfully submitted,

L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642-0306
(817) 729-3211
Bar Card No. 07816000

Attorney for Petitioners, David Diaz, Brenda Starr Diaz and Dixie Marie Hensley

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petitioners Reply Memorandum were duly served upon Respondents Ronald Beyer and Angela Beyer by placing same in the United States mail first class postage prepaid, certified return receipt requested, addressed to Mr. J. Preston Brashear, III, 1580 Eastgate, Suite 320, Garland, Texas 75041 and to Mr. Joe Cannon, Cannon Building, Groesbeck, Texas 76642, attorneys for Respondents and by placing three (3) copies of said petition in the United States mail first class postage prepaid, certified return receipt requested addressed to Mr. Dale Hamilton, 202 East Milam, Mexia, Texas 76667, Guardian ad litem for the infant, Terry Raye Starr (Beyer) on this the _____ day of November, 1981.

L. L. GEREN
Attorney for Petitioners

Petitioner's Reply Brief

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L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642-0306
(817) 729-3211
Bar Card No. 07816000
Attorney for Petitioners

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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To the Honorable Chief Justice and Associate Justices Of the Supreme Court of the United States:

Petitioners, David and Brenda Diaz in reply to the statement of respondents, Ronald and Angela Beyer that they are divorced would show the Court:

Petitioners refer to the divorce proceedings shown in Respondents' "A" A1-A6.

Petitioners, David and Brenda Diaz are reunited and have been living together as husband and wife, for more than the past six months and are still living together. This marriage is a valid common law marriage as provided by the laws of the State of Texas.

They are happy together, except for the loss of their son, Terry Raye Starr Diaz by the Court proceedings of the State of Texas Courts which deprived them of their son.

Reference is made to Rule 22.6, of the United States Supreme Court for authority to present these facts to the Court.

Respectfully submitted,

L. L. GEREN
BRADLEY & GEREN
P. O. Box 306
Groesbeck, Texas 76642-0306
(817) 729-3211
Bar Card No. 07816000

Attorney for Petitioners, David Diaz, Brenda Starr Diaz and Dixie Marie Hensley

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L. L. GEREN
Attorney for Petitioners